No. 1

Supreme Court, U.S.
FILED
06-944 JAN - 2007
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IN THE

Supreme Court of the United States

AT&T CORP. AND GEORGESON SHAREHOLDER COMMUNICATIONS INC.,
Petitioners,

v.

LILA T. GAVIN, on Behalf of Herself and All Other Persons Similarly Situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Congress mandated "national standards for securities class action lawsuits involving nationally traded securities." Pub. L. No. 105-353, 112 Stat. 3227.

In *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 126 S.Ct. 1503, 1514 (2006), this Court read the "*in connection with*" phrase in SLUSA's preemption provision broadly and flexibly in order to avoid "[t]he prospect . . . of parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts." The Seventh Circuit's decision implicates whether this Court's broad and flexible reading of SLUSA also encompasses state-law class actions alleging fraudulent and excessive fees for the exchange of nationally traded securities in a merger. By giving a narrow reading to SLUSA, the decision not only undercuts "national standards for securities class action lawsuits involving nationally traded securities," but it brings to life the very "prospect" of parallel, duplicative class actions which SLUSA and *Dabit* sought to bar. The decision also raises a conflict with a recent Second Circuit decision involving a parallel, nationwide class action based on identical facts, including the same AT&T Corporation merger. *Starr v. Georgeson Shareholder, Inc.*, 412 F.3d 103 (2d Cir. 2005) (affirming the Rule 12(b)(6) dismissal of fraud claims asserted under the federal securities laws while holding that a registered broker-dealer's implied duty to disclose excessive markups, under the "shingle theory," equally applies to a post-merger exchange agent).

The question presented in this petition is:

> Whether SLUSA preempts state-law class actions alleging fraudulent statements or omissions concerning the fees to be charged by a registered broker-dealer for the exchange of nationally traded securities in a merger.

STATEMENT PURSUANT TO RULE 29.6

The Petitioner is Georgeson Shareholder Communications Inc. ("Georgeson") joined by AT&T Corp. ("AT&T") (collectively, "petitioners"). The Respondent is Lila T. Gavin.

Georgeson is wholly owned by Computershare Ltd. Computershare Ltd. is a publicly held company whose shares are traded on the Australian Stock Exchange.

AT&T is wholly owned by AT&T Inc. AT&T Inc. is a publicly held company whose shares are traded on the New York Stock Exchange.

Under the terms of a contract between AT&T and Comcast Corp., Comcast Corp. has agreed to indemnify and defend AT&T in the *Gavin* matter. Comcast Corp., which is not a party, is a publicly held company whose shares are traded on the NASDAQ. Comcast Corp. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the district court (Nordberg, J.) denying plaintiff's motion to remand the action, and granting petitioners' motion to dismiss the complaint, is reprinted in the Appendix ("Pet. App.") at 14a to 17a. The order of the district court (Grady, C.J.) granting petitioners' converted motion for summary judgment on the second amended complaint is reprinted in Pet. App. at 14a to 17a. The Seventh Circuit opinion (Posner, J., joined by Flaum, C.J., and Kanne, J.), reversing Judge Grady's order, is published at 464 F.3d 634 (7th Cir. 2006), and reprinted in Pet. App. at 1a

to 11a. The Seventh Circuit order denying rehearing, and rehearing *en banc*, is reprinted in Pet. App. at 12a to 13a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order, as amended, on September 6, 2006. A timely petition for rehearing, and for rehearing *en banc*, was denied on October 10, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the statutes and regulations set forth at Pet. App. 99a to 101a.

STATEMENT OF THE CASE

A. Introduction

In enacting the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Congress expressed a preference for "national standards for securities class action lawsuits involving nationally traded securities." SLUSA, § 2(5).

This case involves the interpretation of the "in connection with the purchase or sale" of securities phrase which lies at the heart of SLUSA and other federal securities statutes. In passing SLUSA, Congress amended Section 28 of the Securities Exchange Act of 1934 ("Securities Exchange Act") to preempt any private action brought on behalf of 50 or more persons from proceeding, under the statutory or common law of any state in any state or federal court, if the suit alleges a misrepresentation or omission of a material fact "in connection with the purchase or sale of a covered security." 15 U.S.C. §§ 78bb(f)(1) (Pet. App. at 94a). A "covered security" is any security "traded nationally and listed on a regulated national exchange." *Id.* at §§ 78bb(f)(5)(E), 77p(f)(3) (Pet. App. at 2a, 93a, 97a). SLUSA requires that class action litigation involving nationally traded securities must proceed, if at all, only under the federal securities laws. *Id.* at §§ 77p(b), 78bb(f)(1). (Pet. App. at 87a).

This Court has read SLUSA's "in connection with the purchase or sale" language and the identical phrase used in § 10(b) of the Securities Exchange Act broadly and flexibly, not technically and restrictively. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S.Ct. 1503, 1514 (2006); *SEC v. Zandford*, 535 US. 813, 819-822 (2002) (accepting the Securities and Exchange Commission's ("SEC") broad reading of similar "in connection with" language in § 10(b) and Rule 10b-5, and holding such language is triggered where the scheme to defraud and the sale of securities coincide, as distinguished from being separate events).

As this Court has observed, a narrow reading of SLUSA would undercut the effectiveness of the Private Securities Litigation Reform Act of 1995 ("Reform Act"), 109 Stat. 737 (codified at 15 U.S.C. §§ 77z-1 and 78u-4), which sought to curb class-action abuses in litigation involving nationally traded securities. *Dabit*, 126 S.Ct. at 1511. SLUSA's stated purpose includes preventing exactly the litigation tactics allowed by the Seventh Circuit here. Congress enacted SLUSA in order to stem a "shif[t] from Federal to State courts" and "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the Reform Act. SLUSA §§ 2(2),(5). *Dabit*, 126 S.Ct. at 1511.

In construing SLUSA's preemption clause, this Court has given it a broad and flexible reading in order to avoid "[t]he prospect . . . of parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts," and to preclude vexatious and duplicative litigation in state courts. *Dabit*, 126 S.Ct. at 1511, 1514. Scarcely was the ink dry on *Dabit* before that prospect became a reality. *Compare Starr v. Georgeson Shareholder, Inc.*, 412 F.3d 103 (2d Cir. 2005), with *Gavin v. AT&T Corp.*, 464 F.3d 634 (7th Cir. 2006) (the decision below).

Starr and *Gavin* are parallel, nationwide class actions involving allegedly fraudulent statements or omissions concerning the fees to be charged by a registered broker-dealer for the exchange of securities pursuant to the terms of the merger of MediaOne Group, Inc. ("MediaOne") with AT&T. The two Courts reached diametrically opposite results based on identical facts. The Second Circuit's decision affirmed the dismissal of the class-action fraud claims, based on the same facts but pled under federal law, while the Seventh Circuit's decision allows such claims to proceed under state law in state court. This is the antithesis of what Congress sought when it enacted SLUSA. SLUSA §§ 2(2), (5).

Under the Seventh Circuit's analysis, a "sale" of securities is complete as soon as the merger is approved, and therefore post-merger exchange transactions are beyond SLUSA's preemptive scope. The decision below gives a narrow and technical reading to what conduct is "in connection with the purchase or sale" of securities. Unless corrected, the decision will place the exchange of securities incident to a merger, including share-based transaction fees, beyond the reach of not just SLUSA and the Reform Act but the federal securities laws as a whole.

The Seventh Circuit's decision does not indicate what statutory goals or public policy might be served by *exempting* from the federal securities laws the exchange of nationally traded securities following the approval of a merger. This approach is contrary to settled law, policy considerations, and common sense. Where a merger has been approved, "the antifraud provisions afforded by the Securities Act are needed no less than where one makes an outright purchase of stock for cash." A merger's "complex nature" "enhances the opportunities for fraud and thus increases the need for antifraud protection." *Dasho v. Susquehanna Corp.*, 380 F.2d 262, 269 (7th Cir. 1967) (accepting the SEC's position), *cert. denied*, sub nom *Bard v. Dasho*, 389 U.S. 977 (1967), cited with approval in *SEC v. National Securities, Inc.*, 393 U.S.

453, 467 (1969). *Dasho's* approach is correct. A broker-dealer, registered with SEC pursuant to Section 15(a) of the Securities Exchange Act, handles post-merger exchanges of stock. The registered broker-dealer's activities implicate *core concerns* of the federal securities laws: (1) soliciting shareholders to decide if they want to exchange their shares or sell their shares; (2) holding customer securities; and (3) receiving transaction-based compensation from each shareholder rather than the issuer.

The broad language of SLUSA's preemption clause, no less than the broad language of § 10(b) and Rule 10b-5, is expansive enough to encompass a merger's entire process for the exchange of securities, and does not require that the fraud occur during any particular phase of the transaction. The exchange process is not complete, and the merger consideration is not fully paid, until the shareholder, through a registered broker-dealer, has surrendered the pre-merger stock and obtained either the delivery of the post-merger company stock or the proceeds of its sale. *See SEC v. National Securities, Inc.*, 393 U.S. at 467-468 (explaining, in a § 10(b) and Rule 10b-5 enforcement action involving a merger, "shareholders '*purchased*' shares in the new company by *exchanging* them for their old stock.") (Emphasis added). In a nutshell, post-merger conduct coincides with a purchase and sale of securities where, as here, the conduct is part and parcel of the exchange process.

This case raises an exceptionally important federal issue which requires uniformity nationwide. This Court should grant review for two reasons. The first is to restore Congress's express mandate in SLUSA that federal, national standards govern securities class-action lawsuits involving nationally traded securities. The second is to ensure a broad, flexible and consistent construction in the lower courts of the "*in connection with* the purchase or sale" language that serves as the mainspring in SLUSA and other federal securities statutes.

B. The Proceedings Below

Both *Starr v. Georgeson Shareholder, Inc.*, 412 F.3d 103 (2d Cir. 2005), and *Gavin v. AT&T Corp.*, 464 F.3d 634 (7th Cir. 2006), arise from the merger of MediaOne into AT&T. The litigation in both cases focuses on the fees charged by a registered broker-dealer, Georgeson Shareholder Securities Corporation ("Georgeson Securities"), for the exchange of MediaOne shares for AT&T shares pursuant to the terms of the merger. Georgeson Securities is a Georgeson subsidiary. Georgeson offers services to publicly-traded companies to "clean up" mergers by locating and soliciting missing or reluctant shareholders either to convert their pre-merger stock into shares of the post-merger company, or to have the post-merger company stock sold through the registered broker-dealer on the open market.

In June 2000, the shareholders approved the AT&T-MediaOne merger, which provided MediaOne shareholders with several options. The "Standard Election" was for the MediaOne shareholders to receive, in exchange for each of their shares, 0.95 share of AT&T stock plus $36.27 and any accrued but unpaid dividends. AT&T's exchange agent, EquiServe Trust Company ("EquiServe"), would handle the exchange, at no fee to the shareholder. The shareholders could also select other combinations of shares and cash equivalent in value to the Standard Election. Additionally, they had the option of having the AT&T shares sold on the open market by EquiServe, and receiving the sales proceeds and the additional cash payment.

AT&T sent two initial notices, on June 15 and August 1, 2000, both informing the MediaOne shareholders that they must return their stock certificates along with a completed and signed election form. The June 15th notice provided no deadline for the share exchange through EquiServe, but stated that if EquiServe did not receive a shareholder's election form by July 14th the shareholder would be deemed to have

made the Standard Election. The notices advised shareholders that "until we receive your certificates and the AT&T/MediaOne Exchange Form you cannot receive any AT&T shares, cash payments, dividends, or be eligible to participate in future AT&T shareholder meetings." A question-and-answer pamphlet advised that they could "elect how . . . to exchange the[ir] MediaOne shares . . . [by] return[ing] the enclosed Election Form in the enclosed pre-addressed envelope to . . . EquiServe . . . ." Both notices provided a toll-free telephone number for "questions about this procedure or anything related to this transaction." The August 1st notice also encouraged shareholders to exchange their certificates "promptly." The two notices did not state that EquiServe would charge MediaOne shareholders a fee for such an exchange. Shareholders who exchanged their shares through AT&T or EquiServe did not incur a fee for the exchange.

On December 15, 2000, a third notice on AT&T letterhead advised non-tendering MediaOne shareholders that AT&T had "retained Georgeson Shareholder Communications, Inc. to assist you in claiming your shares and cash." Unlike the August 1st notice, this follow-up notice offered shareholders the choice of exchanging their MediaOne shares or cashing out. It stated: "We urge you to claim these shares now. You may choose to have the AT&T shares due you sold on the open market or have them sent to you. To defray the cost of providing you with this service, a processing fee of $7 per AT&T share due you will be deducted from the additional cash payment of $36.27 per MediaOne share you are due, and paid to Georgeson Shareholder Securities Corporation, a member of NASD and SIPC. **Even if you do not have your MediaOne certificate, you may still participate in this voluntary program.**" (Emphasis in original). The follow-up notice added: "eventually, if you continue to do nothing, your [AT&T] stock will be turned over to certain state authorities under the abandoned property laws." The follow-up notice

included an informational brochure and reference to toll-free telephone numbers that shareholders could call for assistance.

The plaintiffs on both *Starr* and *Gavin* alleged that Georgeson securities' fees were fraudulent and excessive. In each case, the complaint asserted that it was false and misleading for the December 15, 2000 follow-up notice to present a sense of urgency and not to mention that the MediaOne shareholders still had the right to have their shares exchanged through EquiServe without a fee. This conduct, the complaints alleged, prevented the shareholders from making informed decisions on their options. At core, the plaintiffs claimed that the notice was part of a AT&T-Georgeson scheme to trick shareholders into believing they had only two choices: to pay Georgeson an allegedly excessive fee for the sale or transfer of the shares before it was too late, or else forfeit their shares to the state under the abandoned property laws.

Attorneys in New York and Illinois filed two parallel nationwide class actions, one under the federal securities laws and one under state law. Ms. Gavin's lawsuit was filed in Illinois state court. Mr. Starr's lawsuit was filed in the United States District Court for the Southern District of New York. Each lawsuit sought relief on behalf of a nationwide class of shareholders who elected to receive AT&T shares and cash as the merger consideration, rather than having the shares sold on the open market, and who used Georgeson Securities to make the exchange and thus had the $7 fee deducted from the merger consideration.

The Southern District of New York records reflect that Ms. Gavin unsuccessfully sought to gain control of Mr. Starr's litigation by applying to the Judicial Panel on Multi-district Litigation to transfer the litigation to the Northern District of Illinois and to consolidate it with her case. (Civil Docket # 13). The records also reflect that Ms. Gavin unsuccessfully filed motions to intervene, to have herself

appointed lead plaintiff and to have her attorneys appointed as lead counsel. (Civil Docket ## 9, 11, 16, 29, 32). Moreover, she argued that federal subject matter jurisdiction was lacking because the post-merger exchange did not involve an investment decision or a purchase or sale of securities. (Civil Docket # 36). Ms. Gavin unsuccessfully sought to intervene in the Second Circuit as well and sought dismissal of Mr. Starr's appeal for lack of jurisdiction because, in her view, the federal securities law claims were not "in connection with the purchase or sale" of a security within the meaning of § 10(b) and Rule 10b-5. (Second Circuit General Docket, filings and orders on 2/20/04, 4/12/04, 4/14/04, 4/19/04, 5/12/04).

1. The Second Circuit Case (*Starr*).

In *Starr*, the complaint made class-action fraud allegations under § 10(b) and Rule 10b-5 based on facts identical to those asserted by Ms. Gavin in her state law claims below. Mr. Starr alleged that the December 15, 2000 follow-up notice was fraudulent and misleading and that the failure by Georgeson, Georgeson Securities and AT&T to inform the shareholders of EquiServe's free services was a material omission. Mr. Starr claimed that the follow-up notice "materially mislead the shareholders into believing that they had no alternative but to exchange their shares through Georgeson, or else to forfeit all value of the shares," with Georgeson "charg[ing] an exorbitant" fee. (Complaint, ¶ 2).

Granting a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court held that Mr. Starr failed to state a claim. The district court ruled that the existence of alternative, and cheaper, methods of effecting the exchange did not render the Georgeson statements untruthful; there was no material omission because the availability of the alternative means of exchange was already part of the "mix" of information readily available; and the allegedly excessive fee was adequately disclosed. *Starr*, 412 F.3d at 108.

The Second Circuit affirmed the dismissal of Mr. Starr's class-action securities fraud allegations for at least two reasons. First, he did not plead justifiable reliance on the allegedly misleading statements in the December 15, 2000 follow-up notice. *Starr*, 412 F.3d at 109. Second, to the extent he claimed a misleading omission, he failed to allege facts that would meet the materiality requirement of § 10(b). *Id.* A shareholder "'with minimal diligence [would] have investigated the already-disclosed alternative means of exchange.'" *Id.* at 110 (citation omitted). The "total mix" of information made available to the shareholders included two detailed notices from AT&T offering share-exchange services through EquiServe without mention of a fee, and a subsequent notice offering Georgeson's exchange services for a fee and instructions for acquiring additional information. "While a superficial or careless reading of these documents might lead some investors to conclude erroneously that they must pay Georgeson's fee, there is no basis for finding a 'substantial likelihood' that a 'reasonable investor' would do so." *Id.* (citation omitted).

The Second Circuit also affirmed the dismissal of Mr. Starr's claim that Georgeson violated a duty under the "shingle theory" to disclose its allegedly excessive fees. Under the shingle theory, a "'securities dealer creates an implied duty to disclose excessive markups by 'hanging out its professional shingle.'" *Starr*, 412 F.3d at 111 (citation omitted). The Second Circuit stated that while the shingle theory has traditionally been applied to registered broker-dealers who sell securities at a markup, "we see no reason not to apply the theory to exchange agents, like Georgeson, that convert stock certificates for a fee." *Id.* The Second Circuit, however, went on to find that "[e]ven if Georgeson's fees were excessive—and we express no opinion as to whether they were—we agree with the district court that Georgeson adequately disclosed them." *Id.*

2. The Seventh Circuit Case (*Gavin*).

In the decision below, the Seventh Circuit addressed class-action fraud claims pled under state law involving exactly the same facts as in *Starr* and the same AT&T-MediaOne merger. Ms. Gavin's complaint alleged, among things, that the December 15, 2000 follow-up notice "falsely represented to Plaintiff and other members of the Class that they had to send in their [] Media Group shares in response to their solicitation or *face losing their investment entirely*." (Emphasis added) (Complaint, ¶ 18). The complaint described the solicitation as a "scheme." (*Id.* at ¶ 31). The complaint alleged that: plaintiff and the class members needed to "make an informed decision regarding the exchange" of their shares; the solicitation was an "offer to purchase"; the solicitation "was false and misleading insofar as it failed to disclose that the $7 per share charge was commercially unreasonable and could be avoided altogether if shareholders exchanged their shares directly through AT&T's Shareowner Services"; and plaintiff would not have agreed to the exchange of shares had the defendants made "full and fair disclosure" concerning the "exchange of stock pursuant to the terms of the merger." (*Id.* at ¶¶ 35, 20, 48, 52-53).

The defendants removed the *Gavin* action to the United States District Court for the Northern District of Illinois based on SLUSA. The district court denied Ms. Gavin's motion to remand and dismissed her complaint as SLUSA-preempted. (Pet. App. at 14a to 17a). She had conceded all requirements for SLUSA preclusion other than whether the alleged wrongdoing was "in connection with the purchase or sale" of securities. The defendants made three independent arguments in support of SLUSA preemption, all of which formed the basis of the district court's order. (Pet. App. at 15a to 17a). First, the MediaOne shareholders had to make an "investment decision" between accepting AT&T stock and cash as the "merger consideration" for their shares or having the AT&T

stock sold by an exchange agent on the open market. Second, the share exchange *itself* was the "purchase" or "sale" of a security within the meaning of the federal securities laws. Third, the exchange was part and parcel of the merger's overall process for the exchange of securities and was therefore "in connection with the purchase or sale" of securities.

After dismissal, Ms. Gavin filed a second amended class action complaint under § 10(b) and Rule 10b-5, alleging misrepresentations and omissions as to whether it was necessary for MediaOne shareholders to incur a fee for the exchange of securities and also alleging an excessive markup claim. The district court granted AT&T and Georgeson summary judgment on the federal claims, finding "no fraud."

The Seventh Circuit reversed and remanded, finding that SLUSA's "in connection with the purchase or sale" language did not preempt Ms. Gavin's action and that removal had thus been improper. The Court concluded that the "sale" was completed with the approval of the merger and the passing of the beneficial interest in the AT&T stock to the MediaOne shareholders. (Pet. App. at 4a). The Court held that allegedly fraudulent statements or omissions regarding the fees to be charged for the exchange of securities incident to the merger involved "garden variety" issues of state-law consumer fraud, issues that were outside of SLUSA's preemptive scope. (Pet. App. at 8a). While describing the state-law fraud claim as a "puzzle," the Court "express[ed] no opinion" about the claim's "merits." (Pet. App. at 5a).

The Seventh Circuit explained that "[o]nly if we refuse to order the case remanded to the state court does [Gavin] want us to proceed under the Rule 10b-5 issue and reverse the district court on the merits." (Pet. App. at 2a). It added that such a reversal on the merits "would place us *in conflict* with the Second Circuit, which in a similar case brought by other MediaOne shareholders (but in federal court, so avoiding SLUSA) held that there was no fraud. *Starr v. Georgeson*

Shareholder, Inc., 412 F.3d 103 (2d Cir. 2005)." (Emphasis added). (Pet. App. at 2a).

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH SLUSA'S BROAD PREEMPTIVE SCOPE AND EXPRESS PURPOSE OF ENSURING NATIONAL STANDARDS FOR SECURITIES CLASS ACTION LAWSUITS INVOLVING NATIONALLY TRADED SECURITIES.

The decision below squarely conflicts with SLUSA's broad preemptive scope and express purpose of ensuring "national standards for securities class action lawsuits involving nationally traded securities," SLUSA, § 2(5), and with Congress's goal of precluding vexatious and duplicative litigation in state court. *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 126 S.Ct. 1503, 1511, 1514 (2006).

Congress recognized that state class-action securities fraud litigation impairs capital formation and diverts resources, impairing the efficiency of the nation's capital markets. S. Rep. No. 105-182, at 3 (1998). In SLUSA, Congress imposed national, federal standards in order to eliminate "fragmentation of investor remedies" which "potentially impose[d] costs that outweigh[ed] the benefits" and thereby to promote the "efficient operation of those markets and the optimal allocation of available capital." *Id.* at 3-5. As this Court has recognized, "federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims." *Dabit,* 126 S.Ct. at 1514.

At issue are the scope and meaning of the broad preemptive language that Congress used in SLUSA's preemption clause. The statute provides that "*no covered class action*" which is "based upon the statutory or common law of any State" may be maintained "in any State or Federal court" "by

any private party" who "allege[s]" either a misrepresentation of a material fact or a deceptive device or contrivance "*in connection with the purchase or sale* of a covered security." (Emphasis added). 15 U.S.C. § 78bb(f)(1). (Pet. App. at 94a).

The Seventh Circuit's reading of SLUSA's preemption clause cuts across the statute's grain. The decision also clashes with this Court's broad and flexible reading of SLUSA's preemption clause in *Dabit*, 126 S.Ct. at 1514, and similar language in § 10(b) and Rule 10b-5 in *SEC v. Zandford*, 535 U.S. 813, 819-822 (2002).

The decision below overlooks the threshold point that shareholders must make "an important and irrevocable *investment decision*" when given the option "to sell or not to sell . . . shares . . . due them upon consummation of the merger." *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 599 (5th Cir. 1974) (emphasis added) (applying section 14(e) of the Williams Act, 15 U.S.C. § 78n(3), to a tender offer which contemplated a change of control) (Wisdom, J.).

In addition, the decision below gives the "in connection with the purchase or sale" of securities language in SLUSA's preemption clause an overly narrow and technical meaning in the context of a merger, a construction that conflicts with settled law. The Court concluded that the sale was complete upon the merger approval and, therefore, the exchange of shares by a registered broker-dealer pursuant to the terms of the merger was not "in connection with" the purchase or sale of securities. (Pet. App. at 4a).

The Seventh Circuit's decision is out of step with this Court's more pragmatic, expansive view of when a purchase and sale are complete in the merger context, one that looks beyond the shareholder approval date. In holding the "broad antifraud purposes" of § 10(b) and Rule 10b-5 "would clearly be furthered by their application" to a merger, this Court explained the shareholders "'*purchased*' shares in the new

company by *exchanging* them for their old stock." *SEC v. National Securities, Inc.*, 393 U.S. 453, 467 (1969) (applying § 10(b) and Rule 10b-5 to merger resulting from alleged misrepresentations in proxy materials) (emphasis added), citing *Dasho v. Susquehanna Corp.*, 380 F.2d 262, 269 (7th Cir. 1967), *cert. denied*, sub nom *Bard v. Dasho*, 389 U.S. 977 (1967). A "sale" or "purchase" is not complete until payment or delivery is made between buyer and seller. In other words, a transaction has not occurred until "settlement."

In *Dasho*, the Court stated that the broad language in the Securities Exchange Act describing "purchase" and "sale" reflects that the "words are not limited to transactions ordinarily governed by the commercial law of sale"; instead, "[*t*]*he purpose is evidently to make control of securities transactions reasonably complete and effective to accomplish the purposes of the legislation.*" 380 F.2d at 266. (Emphasis added). Where a merger is approved, the antifraud provisions afforded by the Securities Exchange Act "are needed no less than in a situation where one makes an outright purchase of stock for cash." *Id.* at 267. The Court agreed with the SEC as "amicus curiae that the complex nature of a merger *enhances the opportunities for fraud* and thus increases the need for antifraud protection." (Emphasis added). *Id.*

The Seventh Circuit's construction of SLUSA contradicts the plain language and natural meaning of the broad statutory text, at the same time undercutting the express purpose behind the Reform Act and SLUSA. The narrowness of the construction effectively removes the federal securities laws from regulation of share exchanges incident to a merger. The curtain falls, in the Seventh Circuit's view, the instant the shareholders approve the merger.

The background, the text and the purpose of SLUSA's preemption clause all require a broader and more flexible interpretation of the statute's reach. Nothing in the statute excludes any part of the exchange of nationally traded

securities in a merger, a process ending only with the share exchange itself.

The Seventh Circuit's decision adopts a construction of commonly-used federal securities terms that resonates beyond SLUSA. The same rigid limitations on "purchase" and "sale" and "*in connection with*" in the merger context would arguably apply to the SEC and the United States in civil and criminal enforcement cases under § 10(b), inasmuch as those cases must satisfy the same statutory elements. This would create a serious rift in the securities landscape. In general, courts have recognized that § 10(b)'s phrase "in connection with the purchase or sale of any security" has a meaning "as broad and flexible as is necessary to accomplish the statute's purpose of protecting investors." *See SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993).

Unless corrected, the Seventh Circuit's decision may spur other courts to reach similar results narrowly construing SLUSA, § 10(b) and Rule 10b-5 in myriad circumstances that defy prediction. This would result in a crazy quilt of conflicting federal and state rules across the land in cases involving nationally traded securities. The implications are far-reaching. In particular, district courts, following the Seventh Circuit's lead, may narrowly construe SLUSA and remand securities class-action fraud cases to state court, for which there would be no appellate review. *Kircher v. Putnam Funds Trust*, 126 S.Ct. 2145, 2156 (2006) (holding that SLUSA does not exempt remand orders from 28 U.S.C. § 1447(d) and its general rule of nonappealability). All of this reopens the door to duplicative, vexatious state court litigation of securities fraud class-action cases, a door that Congress closed in SLUSA and this Court sealed in *Dabit*.

If followed, the rationale of the Seventh Circuit's decision would also fragment the United States' regulation of the securities industry. Registered broker-dealers and transfer agents would still be SEC "regulated entities" subject to

various SEC rules such as recordkeeping, net capital and trade reporting requirements, but the SEC would not have jurisdiction over the same entities for conduct occurring after the customer had made an "investment decision," or after the approval of a merger. If a customer opens an account and a registered broker-dealer accepts a payment for securities which he never intends to deliver, the conduct would be subject to the federal securities laws' antifraud provisions. *See Zandford*, 535 U.S. at 819-820. If a registered broker-dealer, however, makes a misrepresentation of a material fact regarding the securities or a cash payment owed to a customer as merger consideration, or regarding the transaction-based fees to be paid, the "in connection with" requirement would not be met in the Seventh Circuit's eyes and the conduct would escape the antifraud provisions.

The decision below comes from a court which often serves as the court of appeals for disputes arising in national securities markets and whose opinions are closely watched. The decision is at odds with a recent decision by the Second Circuit, *Starr v. Georgeson Shareholder, Inc.*, 412 F.3d 103 (2d Cir. 2005), which likewise often serves as the court of appeals for disputes arising in national securities markets including the New York Stock Exchange, the American Stock Exchange and the NASDAQ. *Starr* necessarily found, despite Ms. Gavin's arguments to that Court to the contrary, that it had subject matter jurisdiction under § 10(b) and Rule 10b-5 to hear Mr. Starr's fraud claims, and it rejected those claims. *Gavin*, in contrast, concluded that SLUSA's "in connection with" requirement had not been met with respect to Ms. Gavin's fraud claims based on identical facts, and remanded the case to state court for further proceedings.

Whether SLUSA preempts state-law class actions alleging excessive brokerage fees is an increasingly litigated issue, as shown by not only *Starr* and *Gavin* but by district court litigation in New Jersey as well. *See, e.g., Securities Law360*,

Portfolio Media, Inc., December 5, 2006 ("SLUSA Trumps Excess-Fees Case v. Lord Abbett") (discussing class action which alleged mutual funds manager compensated brokers excessively as an incentive to steer new investors into the funds); *see also*, Seth Aronson and Amy Longo, "Securities Litigation Uniform Standards Act—The Year I Review" (July 2003) 7-9, O'Melveny & Myers LLP, www.omm.com/omm/distribution/newsletters (commenting that "[m]ost of the caselaw under SLUSA has developed around the issue of whether alleged misrepresentations or omissions occur '*in connection with*'" the purchase or sale of a covered security and discussing cases, including cases involving fees and commissions).

This Court should intervene to conclusively resolve the scope and coverage of the federal securities law statutes. As shown by the decision below, construction of the "in connection with" language involves important, problematic and recurrent issues of law, ones that greatly impact the operation of § 10(b), Rule 10b-5, SLUSA and the Reform Act. The stakes are high. In 1995 Congress enacted the Reform Act to "eliminate abusive and opportunistic securities litigation" that was damaging the entire nation's economy. *Gomper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002). Three years later Congress enacted SLUSA to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate" the Reform Act's "objectives." SLUSA, §§ 2(2), (5). *Dabit*, 126 S.Ct. at 1511.

A. The Decision Resurrects The Very Prospect That SLUSA Was Designed To Bar: Parallel Securities Class Actions Involving Nationally Traded Securities Proceeding In State And Federal Court, With Different Standards Governing Claims Asserted On Identical Facts.

By giving a narrow and technical construction to SLUSA's preemption clause, the decision below resurrects the very

prospect that SLUSA was designed to bar. It brings to life the prospect of "parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts." *Dabit*, 126 S.Ct. at 1514. Such "wasteful, duplicative litigation" is precisely what this Court sought to avoid by giving a broad and flexible reading to the "*in connection with*" phrase in SLUSA's preemption clause. *Dabit*, 126 S.Ct. at 1514.

The decision below turns the clock back ten years. If allowed to stand, it will undercut the effectiveness of not only SLUSA but the Reform Act, which was designed to curb perceived abuses of class action litigation involving nationally traded securities and to put limits on federal securities class actions.

The Reform Act's purpose was to improve the efficiency of the capital markets and to foster economic growth by deterring frivolous and burdensome securities litigation and by improving the flow of information to the markets. *See* S. Rep. No. 104-98, at 4-7 (1995). The perceived abuses included nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers of the clients they purported to represent. *See Dabit*, 126 S.Ct. at 1510-1511.

The Reform Act sought to reduce abusive class actions by limiting recoverable damages and attorney's fees, providing a "safe harbor" for forward looking statements, imposing new restrictions on the selection and compensation for lead plaintiffs, mandating sanctions for frivolous suits, and authorizing a discovery stay pending any motion to dismiss. 15 U.S.C. §§ 78u-4. It also imposed heightened pleading requirements for lawsuits filed under § 10(b) and Rule 10b-5, including a requirement that plaintiffs state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind. 15 U.S.C. §§ 78u-4(b)(1), (2).

In order to avoid the Reform Act's hurdles, plaintiffs and their representatives quickly started to bring class actions involving nationally traded securities under state law, often in state court. *Dabit*, 126 S.Ct. at 1511. These filings occurred even though state-court litigation of class actions involving such securities had previously been rare. *Id.* In state court, plaintiffs were able to proceed under more liberal pleading rules, seek punitive damages, and use the "in terrorem" effects of discovery to extract settlements disproportionate to the suits' actual merits.

In 1998, Congress enacted SLUSA to stem this "shif[t] from Federal to State courts" and "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the Reform Act. SLUSA §§ 2(2), (5), 112 Stat. 3227. *Dabit*, 126 S.Ct. at 1511. In turn, this Court has sought to uphold that goal by construing SLUSA's preemption clause broadly and flexibly, in order to avoid "[t]he prospect . . . of parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts." *Id.* at 1514.

In *Starr* and *Gavin*, the Second and Seventh Circuits reached diametrically opposite results in parallel securities class actions based on identical facts. This uproots Congress's goal of mandating "national standards for securities class actions involving nationally traded securities" and curbing state-law class actions seeking to avoid the Reform Act's requirements. SLUSA §§ 2(2), (5). The Seventh Circuit's direct conflict with SLUSA's express purpose is alone sufficient ground for this Court's review.

B. The Decision Will Undercut The Federal Interest In Protecting The Integrity And Efficient Operation Of The Exchange Of Nationally Traded Securities In Mergers.

If allowed to stand, the decision below will undercut the federal interest in protecting the integrity and efficient

operation of the exchange of nationally traded securities in mergers. This is an area of extraordinary growth. In 2006, United States merger and acquisition activity rose for the fourth year in a row, with the value of announced mergers and acquisitions at the $1.47 trillion level. "U.S. Mergers and Acquisitions May Rise Again in 2007," *Reuters*, December 20, 2006.

In enacting SLUSA, Congress "found the interest in promoting efficient national markets to be the . . . *compelling consideration*" for having the federal securities laws, in the class action context, dictate a uniform standard of liability for conduct involving nationally traded securities. (Emphasis added). S. Rep. No. 105-182, at 4 (1998). The decision below thwarts that interest. It allows class-action plaintiffs to avoid the Reform Act and SLUSA for all share exchange conduct occurring *after* shareholder approval of the merger. (Pet. App. at 4a). It allows "wasteful, duplicative litigation" to proceed in state court under state law standards.

The annual volume of post-merger "clean up" operations appears massive. Ms. Gavin has asserted that the December 15, 2000 follow-up notice was sent to over 110,000 MediaOne shareholders, with over 40,000 shareholders turning in their certificates to Georgeson. (Gavin's Opposition to Defendants' Converted Motion for Summary Judgment, p. 6). It appears that roughly *20 percent* of shareholders do not promptly transfer their shares after a corporate acquisition. *See* "Help in the Hunt for Missing Shareholders," 5/3/05 *Am. Banker* 10A, 2005 WLNR 7276398 (quoting discussion with Georgeson). With mergers of publicly traded companies being commonplace, it is likely that each year many millions of shareholders exchange shares in post-merger "clean ups" or have their new shares sold on the open market.

Mergers among publicly traded companies are vital to the nation's economic system. Enormous sums of money are involved. The merger's process for the exchange of securities

starts, rather than stops, when the merger is approved by shareholders. A difficult trek begins. Some shareholders respond promptly to shareholder communications, exchanging their shares so they may take delivery of new shares or have them sold on the open market. Other shareholders may have moved and not receive the notices. Further efforts at contact are required. For others, even if the envelopes are received and opened, they may not take any action without additional prodding; it may take months and years before the exchange process is complete.

One may wonder what statutory goals or public policy would be served by *exempting* from the federal securities laws, including § 10(b), Rule 10b-5, the Reform Act and SLUSA, the exchange by a registered broker-dealer of nationally traded securities incident to a merger. The Seventh Circuit offered none, analogizing the class action before it to "paper cut" litigation while describing the state-law fraud claim as a "puzzle." (Pet. App. at 7a, 4a).

There is no puzzle. What the Seventh Circuit saw was a tactic, a trend, an historical shift. Ms. Gavin's lawsuit had a number of the hallmarks of the perceived abuses: a state-law, state court nuisance securities class-action, targeting what were believed to be deep-pocket defendants. This activity is exactly what led the Reform Act to bar class-action devices that injure "'the entire U.S. economy.'" *Dabit*, 126 S.Ct. at 1510 (citing H .R. Rep. No. 104-369, p. 31 (1995)).

As this Court noted in *Dabit*, state-court litigation of class actions involving nationally traded securities had been rare before the 1995 enactment of the Reform Act. 126 S.Ct. at 1511. The migration of class-action securities cases to state court followed on the Reform Act's heels. *Id.* The *Gavin* case is one more example of that flight.

Both *Starr* and *Gavin* center on exchange agents who, through registered broker-dealers, handle the sales or exchanges of nationally traded securities incident to a merger

and remit the merger consideration to the shareholders. Uniform federal regulation is essential for the exchange of nationally traded securities in a merger. This is not an area for a federal law vacuum; this is no place for a patchwork of conflicting and inconsistent state law rules. Allowing the decision below to stand will permit state-law class actions that will only encumber the national markets with layers of uncertainty and expense, a disincentive to capital formation and to the listing of foreign companies on national stock exchanges. The loss of United States public market competitiveness compared to global public markets is an area of growing concern. *See, e.g., Interim Report of the Committee on Capital Markets Regulation*, November 30, 2006, ix-xii, 2, *Securities Law360* (pointing out that the U.S. exchange listed market share of all global initial public offerings has dropped from 48% in the late 1990's to 8% in 2006, with securities class actions having a "clear negative impact" on our competitiveness). The regulation of the exchange of nationally traded securities incident to a merger should be federal, not state. So too this Court should uphold Congress's mandate of "national standards for securities class action lawsuits involving nationally traded securities." SLUSA, § 2(5).

If issuers of securities, registered broker-dealers and post-merger exchange agents are subject to the stripes of § 10(b) and Rule 10b-5, they should also benefit from SLUSA preemption with respect to state-law class actions alleging fraudulent and excessive fees. Exempting this area from federal regulation would frustrate the goals of the Reform Act and SLUSA, in particular undercutting the federal interest in protecting the integrity and efficient operation of the exchange of nationally traded securities in mergers.

For this reason, as well, the Court should grant review.

II. THE SEVENTH CIRCUIT'S NARROW CONSTRUCTION OF THE PHRASE "IN CONNECTION WITH THE PURCHASE OR SALE" OF SECURITIES—LANGUAGE ALSO CENTRAL TO THE SECURITIES EXCHANGE ACT AND RULE 10B-5—CLASHES WITH THIS COURT'S BROAD, FLEXIBLE CONSTRUCTION IN *MERRILL LYNCH V. DABIT* AND *SEC V. ZANDFORD*, A CONSTRUCTION ESSENTIAL TO UPHOLDING THE STATUTES' REMEDIAL PURPOSES.

Still another reason supports this Court's review. The Seventh Circuit's narrow construction of the phrase "*in connection with* the purchase or sale" of securities – language central to § 10(b), Rule 10b-5 and SLUSA's core provision – clashes with this Court's broad and flexible construction in *Dabit* and *Zandford*, a construction which is essential to upholding the statutes' remedial purposes. The decision below also gives an unduly technical reading to the words "purchase" and "sale," in conflict with settled law. An exchange of securities incident to a merger *is* a purchase or sale under the federal securities laws. *Dasho*, 380 F.2d at 267; *see also*, *SEC v. National Securities*, 393 U.S. at 467.

More than two decades before the Reform Act and SLUSA, this Court recognized that the nature of securities actions, coupled with the Federal Rules of Civil Procedure's liberal discovery provisions, presented serious opportunities for abuse because the settlement value of such suits will be far out of proportion to their prospects of success at trial. *Blue Chip Stamps v. Manor Drug Stores*, 412 U.S. 723, 740 (1975). Congress enacted the Reform Act, and then SLUSA, in a campaign to cure this continuing problem.

This Court has a "rich tradition" of interpreting the anti-fraud provisions of the federal securities laws expansively. *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 192 (2d

Cir. 1998). *See, e.g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971) (stating that § 10(b) "must be read flexibly, not technically and restrictively," and all misrepresentations "touching" with securities transactions are "in connection with them.").

In *Zandford*, this Court, in construing § 10(b), unanimously held that conduct may be "*in connection with*" the purchase or sale of securities even if the conduct did not affect trading decisions of the defrauded parties or concern the securities' value, as long as the alleged fraud "coincided" with securities transactions by someone. 535 U.S. at 819-820. The Court accepted the SEC's "broad reading" of the statutory language and rejected the broker's contention that his sales of securities, perfectly lawful in themselves, escaped § 10(b)'s reach because they were separate events from his misappropriation of the proceeds. The Court held "[i]t is enough that the scheme to defraud and the sale of securities coincided." *Id.* at 822.

This Court has also construed the identical "*in connection with*" phrase in SLUSA's preemption clause in a broad and flexible manner. *Dabit*, 126 S.Ct. at 1513. The Court observed that "[a] narrow construction of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the 1995 Act." *Id.*

The decision below charts a different course than the one taken by the SEC and this Court. If followed, the decision would represent a sea change in the construction of "purchase" and "sale," and "in connection with," pivotal terms in the federal securities laws including § 10(b), Rule 10b-5 and SLUSA. The narrow and technical construction given by the Seventh Circuit will not further, but counter the statutes'

remedial purposes. It will disrupt the uniformity of law that is SLUSA's express goal. SLUSA, § 2(5). At the same time, it may impede the SEC and the United States in civil and criminal enforcement cases under § 10(b), which uses the same "*in connection with*" phrase.

III. THE SEVENTH CIRCUIT'S DECISION ALSO CONFLICTS, DIRECTLY OR IN PRINCIPLE, WITH A RECENT SECOND CIRCUIT DECISION AFFIRMING THE DISMISSAL OF CLASS-ACTION FRAUD CLAIMS ASSERTED UNDER THE FEDERAL SECURITIES LAWS BASED ON IDENTICAL FACTS, INCLUDING THE SAME AT&T MERGER.

As discussed above, the Seventh Circuit's decision also warrants review because it raises a conflict, directly or in principle, with the Second Circuit's recent decision in *Starr v. Georgeson Shareholder, Inc.*, 412 F.3d 103 (2d Cir. 2005). *Starr* was a parallel, nationwide class action arising from identical facts and based on the AT&T-MediaOne merger. The Second Circuit affirmed the Rule 12(b)(6) dismissal of fraud claims asserted under § 10(b) and Rule 10b-5, at the same time holding a registered broker-dealer's implied duty to disclose excessive markups, under the "shingle theory," equally applies to a post-merger exchange agent.

The decision below noted that *Starr* was "*similar.*" (Emphasis added). (Pet. App. at 2a). The Seventh Circuit stated that "[o]nly if we refuse to order the case remanded to the state court does [Gavin] want us to proceed under the Rule 10b-5 issue and reverse the district court on the merits." (Pet. App. at 2a). Such a reversal, the Seventh Circuit acknowledged, "would place us *in conflict* with the Second Circuit which, in a suit brought by other MediaOne shareholders, held there was no fraud." (Emphasis added). (Pet. App. at 2a).

The conflict in results between the Second and Seventh Circuits is especially acute because it impacts a federal statute intended to ensure the federal securities laws, in the class-action context, provide a *uniform standard* of liability for conduct involving nationally traded securities. This conflict is exactly the type that Congress ought to bar by mandating "national standards" for such lawsuits, SLUSA § 2(5), and precluding vexatious and duplicative litigation in state courts, *Dabit*, 126 S.Ct. at 1511. The Seventh Circuit's narrow and technical construction of the words "purchase" and "sale," and "in connection with" upends Congress's goal.

In *Dabit*, this Court correctly described the preemption clause as SLUSA's "core provision." 126 S.Ct. at 1511. The more narrow the construction of SLUSA's preemption clause, the greater is the likelihood that differing federal and state standards will govern conduct involving nationally traded securities. If this core provision is not properly construed, the statute will fall apart; its center cannot hold.

Gavin, in contrast to *Starr*, demonstrates that point with the greatest clarity.

Swift intervention by this Court is required. As long as there is a circuit split as to what "purchase," "sale" and "in connection with" mean in the context of SLUSA preemption, Congress's express objective of uniform national standards will be illusory, SLUSA, § 2(5), and the Reform Act will not be effective. Indeed, the danger of inconsistent standards being applied under SLUSA and Rule 10b-5 is especially acute in the district courts within each circuit because the Courts of Appeals lack jurisdiction to review district court orders remanding SLUSA-removed actions. *Kircher*, 126 S.Ct. at 2156.

IV. THIS CASE PRESENTS A UNIQUE AND NECESSARY OPPORTUNITY FOR THIS COURT BOTH TO RESTORE SLUSA'S EXPRESS PREEMPTIVE PURPOSE AND TO ENSURE A BROAD AND CONSISTENT CONSTRUCTION OF THE FEDERAL SECURITIES LAWS.

This case presents a unique and necessary opportunity for the Court to bring much-needed clarification to the federal securities laws.

This Court should restore SLUSA's express purpose of ensuring "national standard for securities class action lawsuits involving nationally traded securities," and ending wasteful, duplicative state court litigation. The Court should also resolve the apparent circuit split as to whether an exchange of securities incident to a merger is a "purchase" or "sale," or is "*in connection with* the purchase or sale" of securities, under § 10(b), Rule 10b-5 and SLUSA. A broad, flexible construction of the federal securities laws is essential to upholding their remedial purposes, just as is a consistent reading of those laws among the circuits.

A comparison of the results in *Starr* and *Gavin* confirms the congressional wisdom in enacting SLUSA. An examination of *Gavin's* implications shows the need for this Court's intervention.

A chief purpose of SLUSA is to bar the ability of "a single state [to] impose the risks and costs of its peculiar litigation system on all national issuers." S. Rep. No. 105-182, at 5 (1998). Because this case involves securities that were traded nationally, plaintiffs could select virtually any forum in which to bring their state-law fraud class actions. As long as at least one forum such as the Seventh Circuit allows such class actions to proceed in state court, plaintiffs will have an open gate to bring those suits in the states within that forum. This will totally undermine Congress's goals in the Reform Act and SLUSA.

Given that state-law fraud class actions involving nationally traded securities may easily be filed within the Seventh Circuit, the issue presented by the petition will not be further refined or resolved by allowing it to percolate in the Circuit courts.

AT&T and Georgeson are both deep-pocket defendants, classic targets of strike suits, vexatious discovery requests and exorbitant settlement demands. Congress was aware that the threat of costly and burdensome discovery is one tactic by which "innocent parties are often forced to pay exorbitant 'settlements.'" H. R. Conf. Rep. 104-369, at 32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 740. The Seventh Circuit's decision amplifies Congress's concern. AT&T and Georgeson have already prevailed on the §10(b) and Rule 10b-5 claims in the Second Circuit, which found "no fraud." If the decision below is allowed to stand, they will be forced to defend against class-action fraud claims based on identical facts, but pled under state law, in expensive and distracting state court litigation in Illinois, if not in other states as well. This is the paradigm of what Congress sought to bar in the Reform Act and SLUSA.

Twice Congress has acted to bring a halt to spurious class-action litigation involving nationally traded securities. In its place, Congress has imposed national standards to govern securities class action lawsuits involving those securities. If allowed to stand, the unintended consequence of the decision below will be to split the central axis of the Reform Act and SLUSA.

Intervention by the Court is critical to restore the carefully-crafted balance between federal and state law struck by Congress in the Reform Act and SLUSA and to reestablish the preeminence of both federal statutes.

CONCLUSION

For the foregoing reasons, petitioners urge the Court to grant a writ of certiorari in this case. Petitioners also respectfully suggest that this Court's consideration of the petition may be enhanced by receiving the views of the Solicitor General.

Respectfully submitted,

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January 5, 2007

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRUCIT

No. 05-4398

LILA T. Gavin, on behalf of herself and
of all persons similarly situated,
Plaintiff-Appellant,

v.

AT&T CORP. and GEORGESON SHAREHOLDER
COMMUNICATIONS, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 C 2721—John F. Grady, *Chief Judge*.

ARGUED JUNE 6, 2006—DECIDED SEPTEMBER 6, 2006

Before FLAUM, *Chief Judge*, and POSNER and KANNE, *Circuit Judges*.

POSNER, *Circuit Judge*. This appeal requires us to consider the meaning of "in connection with the purchase or sale of a covered security" in the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C. § 78u-4 *et seq*. The Act provides that a class action, though filed in state court under state law, may be removed to federal district court if the suit alleges "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15

U.S.C. § 77p(b); see also § 78bb(f). A "covered security," defined in §§ 78bb(f)(5)(E), 77p(f)(3), 77r(b), is any security "traded nationally and listed on a regulated national exchange." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503, 1512 (2006); see also *Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 n. 4 (8th Cir. 2002). The Act further provides that a suit properly removed under it must forthwith be dismissed by the federal court because a suit based on fraud in the sale of securities regulated under the federal securities laws cannot be brought under state law. §§ 77p(b), 78bb(f)(1).

The defendants, sued for fraud in an Illinois state court on behalf of a class of shareholders of MediaOne Group, Inc., removed the case to federal district court under SLUSA. The judge denied the plaintiff's motion to remand the case to the state court and dismissed the suit, whereupon the plaintiff filed a complaint in the district court under Rule 10b-5, which the district judge dismissed on the merits. The appeal mainly challenges the removal; the plaintiff wants to be back in state court, suing under state law. Only if we refuse to order the case remanded to the state court does she want us to proceed to the Rule 10b-5 issue and reverse the district court on the merits. That would place us in conflict with the Second Circuit, which in a similar case brought by other MediaOne shareholders (but in federal court, so avoiding SLUSA) held that there was no fraud. *Starr v. Georgeson Shareholder, Inc.*, 412 F.3d 103 (2d Cir. 2005).

In June 2000, MediaOne merged with AT&T. The terms of the merger entitled shareholders in MediaOne to obtain in exchange for each of their shares 0.95 shares of AT&T stock plus $36.27 and any accrued but unpaid dividends. This package was the "Standard Election." But MediaOne shareholders could if they preferred select other combinations of shares and cash that would be equal in value to the "Standard Election" share-cash package.

AT&T notified the MediaOne shareholders of their choices on June 15 and explained that they could obtain the cash and /or AT&T shares to which the choice they made entitled them by mailing their MediaOne share certificates to EquiServe Trust Company, AT&T's exchange agent. There was no charge for this service. The notice fixed a deadline of July 14 for choosing any of the alternatives to the Standard Election, but no deadline for the Standard Election itself.

On August 1, AT&T sent a follow-up notice to those MediaOne Group shareholders who had not responded to the first notice. The letter explained that they could still exercise the Standard Election (though not the other options, the July 14 deadline having passed), again through EquiServe and again without charge.

Finally, on December 15, defendant Georgeson, hired by AT&T to perform a postmerger "clean up" or "round up," mailed a notice on AT&T letterhead to those MediaOne shareholders who still had not responded to either of the previous notices. The letter urged them to exercise their Standard Election rights by submitting their MediaOne shares to Georgeson in exchange for either a combination of cash and stock or an all-cash equivalent. The letter warned that "eventually, if you continue to do nothing, your [AT&T] stock and underlying assets will be turned over to certain state authorities under the abandoned property laws." Remember that AT&T had set no deadline for the Standard Election. Georgeson was reminding those MediaOne shareholders who had not yet made an election, and now were confined to the Standard Election because the deadline for the alternatives had passed, that state abandonment law set a deadline.

Abandoned property escheats to the state after a specified period, Uniform Disposition of Unclaimed Property Act (1966), codified in Illinois as 765 ILCS 1025/0.05 *et seq.*, and shares of stock that are not claimed by the beneficial owner are deemed abandoned. 765 ILCS 1025/2a. Either that Act or

the superseding Uniform Unclaimed Property Act (1995) have been adopted in 29 states plus the District of Columbia, and most, perhaps all, other states have similar laws. E.g., N.Y. Personal Property Law §§ 251-258 (McKinney 1992). In the state court, the plaintiff requested certification of a nationwide class and in the alternative a statewide (Illinois) class consisting of "all residents, or persons or legal entities, who [are MediaOne shareholders and] may properly avail themselves of the Illinois Consumer Fraud Act." No class was ever certified.

Georgeson's letter specified a fee of $7 per MediaOne share for the exchange service offered in the letter and did not mention that the recipients of the letter could still obtain the Standard Election package at no charge through EquiServe. The failure to mention that option is the fraud charged in the complaint.

We do not think the alleged fraud can be said to be "in connection with the purchase or sale of a covered security," namely stock in MediaOne. When the merger was consummated in June of 2000, MediaOne's shareholders became the beneficial owners of AT&T stock. Those shareholders whose MediaOne shares had been held by their brokerage firms were immediately credited with the receipt of AT&T stock plus cash. Those shareholders (the plaintiff and the members of her class) who possessed share certificates might not get their new cash/stocks right away, but they had a firm entitlement to their proportionate share of the cash and stock that AT&T had set aside to fund the acquisition of MediaOne. The alleged fraud—the omission in Georgeson's letter of December 15 of any mention of the free option—happened afterwards and had nothing more to do with federal securities law than if Georgeson had asked the MediaOne shareholders "do you want your AT&T shares sent to you by regular mail or by courier?" and had charged an inflated fee for the courier service. Or if AT&T had said "if you don't want your spouse

to learn about your good fortune, we'll send you your shares in a brown paper envelope"; and later the spouse failed to claim the shares in her divorce proceeding and sued AT&T and her husband for fraud.

AT&T didn't want the shareholders of the firm it had just bought to wake up one day and find that their part of the sale price had gone not to themselves but to a state. Hence the three notices—though why the last one neglected to remind the shareholders that they could still protect their stock from being escheated without having to pay $7 a share to another company is a puzzle, as well as the foundation of the fraud claim (about the merits of which we express no opinion). Presumably Georgeson showed AT&T the letter before mailing it; it was, after all, on AT&T's stationery.

This would be a different case from the standpoint of SLUSA had the MediaOne shareholders been induced by fraudulent representations by AT&T to vote for the merger and as a result ended up with AT&T stock worth less than the MediaOne stock that they had exchanged. E.g., *Dasho v. Susquehanna Corp.*, 380 F.2d 262 (7th Cir. 1967); Dennis F. Dunne, "Stock Repurchase Agreements in Bankruptcy: A Tale of State Law Rights Discarded," 12 *Bank. Dev. J.* 355, 386 (1996). It is true that one option offered in the December 15 letter was that Georgeson would sell the recipient's shares and send him the cash if he preferred that to stock plus cash. But it's not as if Georgeson was trying to buy the shares on the cheap. The $7 fee it was charging for its service was its entire consideration and was the same whether the recipient wanted cash or shares. Georgeson acquired no investment interest. Shareholders would take up Georgeson's offer of the cash alternative only if they didn't want to own AT&T shares; it was their choice entirely.

One could speculate—though the plaintiff does not—that someone who had planned to sell the AT&T stock to which he was entitled as a result of the merger, but to do so later on

rather than immediately, might accelerate his decision when he learned that it would cost him $7 per share to obtain the stock; he might do this in order to avoid a future brokerage fee on top of the $7. But that is no different from what would happen if a bank charged an exorbitant fee for a safe deposit box in which to keep one's shares of stock: some people would decide to sell their stock rather than pay the fee. One would hardly say that a class action against the bank in such a case would be an action "*involving* nationally traded securities," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, supra*, 126 S. Ct. at 1514 (emphasis added), which is the Supreme Court's characterization of SLUSA's scope.

The defendants argue that since Georgeson's service charge was calculated on a per-share basis, the effect was to reduce by $7 the value of each of the AT&T shares that the MediaOne shareholders who accepted Georgeson's offer received. But that is like saying that if the shareholders had received their AT&T shares and later sold them, the value of their shares would have been diminished by the brokerage fee on the later transaction. What happens to shares after they are sold is not "in connection with" the sale. The merger was the sale. That the beneficial owners who responded to the December 15 offer paid money to make sure that they got the shares rather than the state was no different from their paying a bank to keep the share certificates in a safe-deposit box.

The defendants have confused a transaction with its sequelae. After you buy a car and drive away with your new possession, much can happen to affect the value of your purchase. If what happens is traceable to something that occurred before the sale was complete, such as a defective engine block, you may be able to undo the sale on the basis that that something happened "in connection with" the sale. But if something happens after the transaction is complete to make it less worthwhile to you, such as the dealer's replacing a tire that has worn out with one that is the wrong size, it is a

separate wrong, not anything connected with the original sale unless the wrong is a breach of warranty.

Of course there is a literal sense in which anything that happens that would not have happened but for some prior event is connected to that event. In that sense the fraud of which the plaintiff complains is connected to the merger, without which there would not have been such a fraud against the plaintiff and her class. But in the same sense the fraud is connected to the Big Bang, without which there would never have been a MediaOne or even an AT&T.

Gurwara v. LyphoMed, Inc., 937 F.2d 380 (7th Cir. 1991), illustrates the limitations of "in connection with." It held that an employer's refusal to sell an employee stock to which he was entitled by his employment contract was not an act "in connection with the purchase or sale of securities." The alleged "misrepresentation went only to [the plaintiff's] opportunity to purchase the stock at the described price. It in no way related to the value of that stock . . . . [It] did not go to the value of the stock at issue or the value of the consideration in return for it " *Id.* at 38283; see also *Green v. Ameritrade, Inc.*, 279 F.3d 590, 598-99 (8th Cir. 2002).

Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930 (2d Cir. 1984), makes the general point that the cases just cited illustrate: a mere "but for" cause linking a securities transaction (here, the merger of MediaOne into AT&T) to a subsequent injury (concealment of the option to receive the Standard Election without paying any fee) does not make the injury one suffered "in connection with the purchase or sale of securities." Otherwise SLUSA would apply to a class action by shareholders who suffered paper cuts when they opened the letters informing them of their rights under the merger.

Ketchum v. Green, 557 F.2d 1022 (3d Cir. 1977), nails down the point: two directors alleged that they had been

fraudulently induced to cast a vote that ultimately enabled other directors to fire them, which triggered a provision of their retirement plan that required terminated employees to resell their stock to the corporation at a discount. The fraud, they argued, was thus "in connection with the purchase or sale of securities." The court disagreed. It was a classic but-for case: the loss on the sale would not have occurred had it not been for the fraud, but the fraud had nothing (else) to do with that loss. As we said in *Frymire Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 189 (7th Cir. 1993), "the 'connection' requirement must be taken seriously." Cf. *Bellah v. First Nat'l Bank*, 495 F.2d 1109, 1114 (5th Cir. 1974).

If any doubt remains that the alleged fraud should not be deemed in connection with the purchase or sale of MediaOne stock, consider the issues that are germane to whether the Georgeson letter was indeed fraudulent. They have nothing to do with efforts to manipulate the prices of securities, with failure to make full disclosure of all facts known to the seller or issuer that might be material to a purchaser, with the regulation of stock exchanges, or with any other concern of federal securities law. They are garden-variety issues of state-law consumer fraud, such as whether a statement in the December 15 letter inviting the recipient to call Georgeson if he had any questions, in conjunction with the references to the free EquiServe option in the two previous letters, gave the class members enough information that they should blame themselves for accepting Georgeson's offer. It would be the same kind of case had the letter invited the recipient to pay $7 for Linux software that he could download for free from the Internet.

The purpose of SLUSA was to prevent plaintiffs from making an end run around the restrictions on suits for federal securities fraud suits introduced by the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 15 U.S.C. §§ 77z-1, 78u-4, by filing the suits in state

courts under state law. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, supra*, 126 S. Ct. at 1510-11; see Michael A. Perino, "Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action," 50 *Stan. L. Rev.* 273 (1998). The terms of a statute can carry beyond its purpose, to prevent the opening of loopholes. But we do not see how an interpretation that would allow removal in this case could do that. The plaintiffs are not trying to litigate a securities fraud case, but instead a consumer fraud case against companies that have made no effort to influence the purchase or sale of a covered security. "Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud." *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982).

There is one more point to note about this case. The defendants want to be in federal court. And the complaint that the plaintiff filed in state court actually alleges the essential facts that demonstrate the presence of federal diversity jurisdiction, which would enable removal because the defendants are not citizens of the state (Illinois) of which the plaintiff is a citizen. (AT&T is a citizen of New York and Georgeson a citizen of New York and Delaware.) Yet the removal petition does not mention diversity; nor has either defendant asked us to retain jurisdiction on the basis of diversity. Georgeson's lawyer told us that the defendants had not sought removal on the alternative ground of diversity because they were certain there was jurisdiction under SLUSA. That was a mistake, but he added that he doubted that the plaintiff's complaint satisfied the requirement that the amount in controversy exceed $75,000. That was another mistake.

The complaint alleges compensatory damages of $1,645 (the 235 MediaOne shares that the plaintiff exchanged through Georgeson times the $7 fee) plus punitive damages in an unspecified amount. When the award of compensatory damages is large, a punitive-damages multiple in excess of

single digits is presumptively unconstitutional. *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). But a higher multiple is permissible when the expected award of compensatory damages is so small that it would be unlikely to induce a suit even of compelling legal merit, especially if there are multiple victims and an indication that the tortfeasor has been eluding liability successfully. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). For these are further indications that without a hefty award of punitive damages the wrongful conduct will not be deterred.

In *Mathias* each plaintiff had received an award of $5,000 in compensatory damages, and we upheld a further award to each of $186,000 in punitive damages—a ratio of 37.2 to 1. In this case, an award of $73,355 in punitive damages would be necessary to get the plaintiff to the $75,000 threshold that one must cross to satisfy the amount-in-controversy requirement. That would be a higher ratio than in *Mathias*. But since the compensatory damages sought in this case are little more than a third as great as those in that case, one could not say as a matter of law that the plaintiff would be unable to cross the threshold; and therefore this case really is within the diversity jurisdiction.

Some cases, it is true, appear to make the permissible ratio of punitive to compensatory damages depend less on the factors we have stressed than on how egregious the defendant's wrongdoing was—the more egregious, the higher the permissible ratio. E.g., *Planned Parenthood of Columbia/ Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005). Egregiousness is of course highly relevant to the appropriateness of awarding punitive damages at all, and sometimes to the amount. But it is relevant to the ratio of punitive to compensatory damages only insofar as the greater the punitive damages are, the higher the ratio of punitive to compensatory damages is likely to be. The

proper focus of analysis of the ratio itself is the adequacy of the combined award of compensatory and punitive damages to motivate the prosecution of a meritorious claim. If compensatory damages are slight, a single-digit ratio is likely to be insufficient. And that appears to be the case here.

We assume that the defendants would prefer to litigate the plaintiff's Illinois tort claim in federal court. But as they have never suggested diversity as a basis for citizenship, insisting instead on placing all their jurisdictional eggs in the SLUSA basket, there we shall leave them.

The judgment of the district court is reversed with instructions to vacate all previous rulings in the litigation and remand the case to the court from which it was removed.

A true Copy:

Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 05.4398

LILA T. GAVIN, on behalf of herself and
of all persons similarly situated,
Plaintiff-Appellant,

v.

AT&T CORP. and GEORGESON SHAREHOLDER
COMMUNICATIONS, INC.,
Defendants-Appellees.

October 10, 2006

Before

Hon. Joel M. Flaum, *Chief Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 01 C 2721

John F. Grady, *Judge*.

ORDER

On September 20, 2006, defendants-appellees filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the

petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*.* The petition is therefore DENIED.

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* Judge Ilana Diamond Rovner and Judge Ann Claire Williams took no part in the consideration of this matter.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	John Nordberg	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	01 C 2721	DATE	1/23/2002
CASE TITLE		Lila T. Gavin v. AT&T Corp., et al.	

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION: Plaintiff's Motion to Remand & Defendant's Motion to Dismiss

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due __.

(3) ☐ Answer brief to motion due __. Reply to answer brief due __.

(4) ☐ Ruling/Hearing on __ set for __ at __.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on __ set for __ at __.

(6) ☐ Pretrial conference [held/continued to] [set for/re-sert for] on __ set for __ at __.

(7) ☐ Trial [set for/re-set for] on __ at __.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to __ at __.

(9) ☐ This case id dismissed [with/without] prejudice and without costs [by/agreement/ pursuant to]
☐ FRCP4(m) ☐ General Rule 21
☐ FRCP41(a)(1) ☐ FRCP41(a)(2)

10. ■ [Other docket entry] Plaintiff's Motion to remand is DENIED, and Defendant's Motion to Dismiss is GRANTED, without prejudice. The case is set for status on February 28, 2002 at 2:30 p.m. Plaintiff is directed to filed an amended complaint by no later than February 21, 2002.

11. ■ [For further detail see order on the reverse side of the original minute order.]

ORDER

Plaintiff Lila Gavin originally filed this class action against AT&T Corp. and Georgeson Shareholder Communications, Inc. in Illinois state court raising four fraud-based claims pursuant to Illinois statutory and common law (and disavowing any securities claim). Plaintiff was the holder of shares of U.S. Media Group; those shares became exchangeable for Media One shares in 1998 pursuant to a corporate spin off. In June 2000, Media One merged with AT&T. As a consequence of the merger, individuals holding U.S. Media Group shares were entitled to exchange each such share for .95 shares of AT&T stock and cash. Plaintiff takes issue with a December 2000 letter from AT&T, which encouraged shareholders like the Plaintiff to make the exchange through Georges on for a fee of $7 per share. Plaintiff maintains the fee was unreasonable and the letter deceptively failed to mention lower cost means of effecting the exchange. Defendant removed this action on the grounds that the state claims were completely preempted by the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 78bb(f). Before the court is Plaintiff's motion to remand on

the grounds that her claims do not implicate SLUSA, because there was no purchase/ sale, and the Defendant's motion to dismiss on the grounds of preemption. Both motions hinge on whether the case was properly removed as preempted by SLUSA.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U, S. 41, 45-6 (1957). In evaluating a motion to dismiss, the court should take all the allegations of the complaint as true and grant the plaintiff the benefit of all inferences. *Caremark, Inc. v. Comm Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir. 1997). The parties appear to agree that a case is preempted under SLUSA if (1) the underlying suit is a "covered class action," (2) the claim is based on state law, (3) the claim concerns a covered security, and (4) plaintiff alleges deceptive/manipulative statements or omissions in connection with the purchase/sale of the security. *See, e.g., Prager v. Knight/Trimark Group, Inc.*, 124 F.Supp.2d 229, 231 (D.N.J. 2000). The only issue the parties meaningfully dispute is whether the exchange of Plaintiff's U.S. West Media Group shares for AT& T shares and cash constituted a purchase or sale.

Ultimately, the court must conclude the action is preempted. First, the exchange of shares during a merger is a purchase/sale for purposes of the antifraud provisions of the securities laws. *Davidson v. Belcor, Inc.*, 933 F .2d 603, 606 (7th Cir. 1991). This case clearly involves a merger, which distinguishes many of the cases Plaintiff presents, including *Gordon v. Buntrock*, No. 00cv303, 2000 WL 556763, (N.D. III. April 28, 2000), which involved the continued holding of securities, and *Isquith v. Caremark International, Inc.*, 136 F.3d 531 (7th Cir.), *cert. denied*, 525 U.S. 920 (1998), which involved a stock spin off that the court analogized to a stock dividend. Plaintiff argues that the merger took place in June,

which meant the actual exchange which took place many months later was merely an internal corporate administrative function. This contention is unpersuasive. The time lag from the merger to the actual physical exchange of each shareholders shares appears irrelevant. A merger is a sale when the appropriate documents are filed, even if a shareholder has not yet tendered their shares before filing suit. *See generally Yabsley v. Conover*, 644 F.Supp. 689, 699 (N.D. Ill. 1986); *Issen v. GSC Enterps., Inc.*, 508 F.Supp. 1278, 1285-7 (N.D. Ill. 1981). Moreover, Plaintiff's own pleadings make it quite clear the exchange and the merger were inextricably linked, referring to the AT&T shares and cash as "merger consideration" (Complaint at ¶ 19) and the "exchange of stock pursuant to the terms of a merger" (Complaint at ¶ 48). Plaintiff also argues that there was no purchase or sale because Plaintiff made no investment decision, as the terms of the exchange were set in the merger agreement. This contention is also belied by Plaintiff's allegations, in which she acknowledges that, Defendant's letter gave her the option of receiving her AT&T shares or having them sold on the open market (Complaint at ¶ 22). The option of receiving stock or opting out and receiving cash requires an "investment decision" on the part of the recipient. *In re Nanophase Technologies Corporation Securities Litigation*, No. 98cv3450, 2000 WL 1154631, at *4-5 (N.D. Ill. Aug. 14, 2000).

For the reasons stated above, Plaintiff's Motion to remand is DENIED, and Defendant's Motion to Dismiss is GRANTED, without prejudice. The case is set for status on February 28, 2002 at 2:30 p.m. Plaintiff is directed to file an amended complaint by no later than February 21, 2002.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed June 7, 2005]

No. 01 C 2721

LILA T. GAVIN,

Plaintiff,

v.

AT&T CORP. and GEORGESON SHAREHOLDER COMMUNICATIONS, INC.,

Defendants.

MEMORANDUM OPINION

Plaintiff Lila T. Gavin brings this putative class action against defendants AT&T Corp. ("AT&T") and Georgeson Shareholder Communications Inc. ("Georgeson") alleging fraud in violation of the federal securities laws and New York common law in connection with a post-merger stock exchange program. Before the court are defendants' separately-filed motions for summary judgment. For the reasons set forth below, AT&T's motion is granted, and Georgeson's motion is granted in part and denied in part.

FACTUAL BACKGROUND

The following facts are undisputed unless otherwise noted.[1]

[1] The present motions were originally filed as motions to dismiss. However, because defendants attached evidence beyond the scope of the pleadings, we converted their filings into motions for summary judgment. *See Gavin v. AT&T*, 2004 WL 2260632, at *1 (N.D. Ill. Sept. 30, 2004). We gave the parties an opportunity to conduct discovery and to file fresh

The Mergers and the Stock Exchange Notices

In 1998, Gavin was a holder of 235 shares of US West Media Group ("US West") common stock. That year, US West split off from US West, Inc. and merged with MediaOne Group, Inc. ("MediaOne"). Gavin's US West shares became exchangable for MediaOne shares on a one-for-one basis. In June 1998, MediaOne sent US West shareholders, including Gavin, a notice requesting that they exchange their US West shares for MediaOne shares. Gavin did not do so.

Then, in June 2000, MediaOne merged with AT&T. The terms of the merger were set forth in an August 1999 MediaOne Proxy Statement that was mailed to all MediaOne stockholders and those, like Gavin, still holding unexchanged US West shares. (AT&T Ex. A ("Proxy").) The Proxy stated that MediaOne and US West shareholders had the option of exchanging their stock certificates for AT&T shares, cash, or a combination of the two. The Proxy indicated that instructions on how to exchange the shares would be mailed following the merger. There was no mention of a fee in connection with the share exchange.

On June 15, 2000, the merger then complete, AT&T sent to US West and MediaOne shareholders a notice explaining the share exchange alternatives (stock, cash or both) and an election form. (AT&T Ex. B ("June 15 notice").) The notice requested that shareholders send their election form and stock certificates in an enclosed pre-addressed and insured envelope to AT&T's transfer agent, EquiServe Trust Company

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summary judgment papers supplemented with the results of that discovery. The parties have done so. Yet, inexplicably, no party has filed a statement of undisputed facts as required by Local Rule 56.1. The burden on the court caused by the parties' noncompliance, though tangible, has not been significant only because the record is largely uncontested. Going forward, however, a party who chooses to ignore the requirements of the Local Rules does so at its own peril.

("EquiServe"). The notice "strongly encourage[d shareholders] to return the necessary documents as soon as possible," and provided a toll-free telephone number if shareholders "[had] any additional questions that aren't answered here . . ." (*Id.*) Like the Proxy, the June 15 notice did not state that shareholders would be charged a fee for exchanging their shares.

AT&T sent a second, similar notice on August 1, 2000 to shareholders who still held certificates of US West or MediaOne stock. (AT&T Ex. C ("August 1 notice").) The notice contained instructions on how to exchange shares through EquiServe, along with an insured, pre-addressed envelope. The notice stated that "[i]t is important that you return your certificates promptly," and included a toll-free telephone number for "questions about this procedure or anything related to this transaction." (*Id.*) Again, the notice did not indicate that any fee would be incurred for exchanging the shares. Shareholders who did exchange their shares through EquiServe in response to the June 15 or August 1 notices were in fact not charged any fees.

Many MediaOne and US West shareholders, including Gavin, did not respond to either notice, and still held their unexchanged shares. AT&T therefore hired Georgeson to conduct a "post-merger cleanup" ("PMC") which, according to Georgeson's website, is a program intended "to reunite as many as 90% of unexchanged shareholders with their rightful assets, all at no cost to our clients." (Sec. Am. Compl., ¶ 25.) A "Postmerger Cleanup Agreement," entered into between AT&T and Georgeson on December 15, 2000, provided the details of the PMC:

> AT&T Corp. ("T") has agreed to retain Georgeson Shareholder Communications Inc. ("GSC") to contact unexchanged shareholders . . . of MediaOne Group, Inc. and US West Media Group and assist them in surrendering their old stock certificates in exchange for the

new certificates and any cash due them (the "Program"). It is understood that previous communications have been sent to the last known addresses of the unexchanged accounts but have been unsuccessful in effecting the surrendering of their old stock certificates. Unexchanged shareholders will finance the Program and T will incur no expenses in connection with this project. All costs, including exchange agent and transfer agent fees, will be borne by GSC. The exchanging shareholders will be charged a processing fee by GSC's broker-dealer subsidiary, Georgeson Shareholder Securities Corporation, as mutually agreed upon by T and GSC. No deduction from proceeds shall be made from any exchanging shareholder without an agreement signed by each authorizing said deduction.

* * *

GSC will prepare materials to be sent to the individual shareholders fully explaining the transaction and the amounts to be deducted. T will have final approvals on all industry standard materials to be sent out. Both T and GSC reserve the right to waive processing fees from any shareholder on a case by case basis. During the program, if any shareholder contacts GSC inquiring about how they can contact the transfer agent directly to facilitate their exchange, GSC will direct them to the transfer agent without charge. It is agreed that any shareholders who return their stock directly to T or its transfer agent, even after being contacted by GSC, will be entitled to full exchange value and that GSC will not be entitled to any fee or other costs in connection with that exchange.

* * *

The project will involve three participation periods, with the initial period having a 6-week deadline for acting and then two subsequent periods of similar duration. The

> initial period will begin on December 15, 2000 and end on January 23, 2001. It is understood that the timing of the subsequent periods will depend upon other T activities and will be scheduled at mutually agreeable dates after the end of the initial period. If mutually agreed, an additional period may be added to the project at the end of the 3rd period. GSC will provide T with [a] status report every week. . . .

(AT&T Ex. D ("the PMC Agreement").)

On December 15, 2000, Georgeson sent a notice to all MediaOne and US West shareholders who had yet to exchange their shares. The notice sent to US West shareholders, including Gavin, stated as follows:

> Dear Stockholder:
>
> Our records show that you still hold shares of US WEST MEDIA GROUP. There is no longer a market for these shares as a result of the 1998 split off from US WEST and exchange into MediaOne Group, Inc. Each share of US WEST Media Group was exchangable into MediaOne on a one-for-one basis. Subsequently, in June 2000, MediaOne merged with AT&T Corp. Following the merger, you are now due 0.95 of a share of AT&T and a cash payment of $36.27 for every US WEST Media Group share you hold, plus all accrued dividends paid on these shares. Based on AT&T's $22 price per share on December 14, 2000, each share of US WEST Media Group would receive merger consideration of approximately $59. Both the number of US West Media Group shares you own and the AT&T shares and cash payment due you is indicated on the attached Claim Card.
>
> We have retained Georgeson Shareholder Communications, Inc. to assist you in claiming your shares and cash. We urge you to claim these shares now. You may choose to have the AT&T shares due you sold on the

> open market or have them sent to you. To defray the cost of providing you with this service, a processing fee of $7 per AT&T share due you will be deducted from the additional cash payment of $36.27 per US WEST Media Group share you are due, and paid to Georgeson Shareholder Securities Corporation, member of NASD and SIPC. Even if you do not have your US West Media Group certificate(s), you may still participate in this voluntary program.
>
> Please read the enclosed materials carefully. There is no benefit in continuing to hold your old shares. Eventually, if you continue to do nothing, your stock and underlying assets will be turned over to certain state authorities under the abandoned property laws. Georgeson Shareholder Communications Inc. is being permitted to administer this voluntary program through January 23, 2001. If you have questions after reading this material, please call GSC's toll-free number, at 1 (888) 352-4639 for assistance.
>
> Sincerely,
>
> AT&T Corp.

(AT&T Ex. E ("December 15 notice").)[2] Gavin tendered her US West stock certificates to Georgeson in January 2001 in exchange for AT&T shares plus cash. In doing so, Gavin incurred a $7 "processing fee" for each AT&T share she received.[3]

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[2] A materially identical notice was sent to MediaOne shareholders. Each of the notices—the June and August notices directing shareholders to EquiServe, and the December notice steering them to Georgeson—bears AT&T's corporate logo and is signed either by an AT&T employee or simply as "AT&T Corp."

[3] By our calculation, Gavin paid a total fee of $1,562.75.

Shareholder Complaints

Gavin did not attempt to contact either Georgeson or AT&T to complain about the fee. Other US West shareholders did, however.[4] Shareholders who telephoned Georgeson to complain about the $7 fee were told by a Georgeson agent that they would receive a return call from a "qualified representative." The agent would write down the shareholder's contact information, the total "processing fee" the shareholder stood to incur, and a summary of the shareholder's complaint, all on a form titled "PMC Fee Reduction/ Discussion Follow-Up." (Gavin Exs. 2, 3, 6 ("Follow-Up forms").) The complaint summaries, as recorded on the Follow-Up forms, are as follows:

> S/H would like a qualified rep. to discuss fees w/him.
>
> Would like to discuss fees.
>
> Is not happy with Fee wants someone to call him considering fee.
>
> S/H would like to discuss proc. fee.
>
> S-H irate about service fee.
>
> Requesting a fee reduction on her media group acct. Concerned about outrageous price. . . .
>
> Shareowner feels that the fees are too high. . . . [W]ould like a call regarding this issue.
>
> Would like to discuss the fee.

---

[4] Discovery in connection with the present motions was limited to inquiries made by holders, like Gavin, of US West stock. (*See* Tr. Nov. 3, 2004 Hrg., p. 9 ("I am going to limit the discovery to the U.S. West Media Group transaction. . . . [I]t's appropriate for the plaintiff to have access to any communications between Georgeson and any shareholder in the U.S. West Media Group, not any other shareholders and not any other transactions.").

[N]ot happy with service fee, wants some[one] to discuss fee.

[C]alled and requested that someone please call her back regarding the fee reduction.

S/H asked what will be the effect on my shares? At this point I provided a breakdown including shares due, amount due (no calculations done) and fee. After mentioning fees, S/H asked if there was a way to avoid this. I told him it would be followed up on by a qualified rep. and in the meantime, the materials would be remailed. Also provided phone # for Media Group (in case no one called him back).

Wants call back to negotiate fee.

[C]alled to ask about service fee . . . he requested to have a cert. rep. call him back to discuss fees.

S/H feels that the fee is ridiculous and is not willing to pay. He would like to discuss fee with a qualified rep.

Wants to negotiate $7 fee.

Shareholder wanted someone to call him back to discuss fees.

Wanted reduced fee.

Please have someone get back to her regarding paying the fee; she does want to cooperate but does not feel she should have to pay the fee.

Would like to negotiate the fee.

S/H spoke to broker and felt the fee was ridiculous.

Wants to discuss reducing fees.

Both parents deceased right around time of merger.

[W]as not too happy about the processing fee. She would like someone to call back.

> Elderly S/H concerned by fee. Spk to S/H's friend but he said S/H should be able to understand what's going on.
>
> Would like to discuss fees.
>
> Requested conference on processing fees.

(*Id.*) Some shareholders telephoned Georgeson more than once:

> She was supposed to be contacted by the fee reduction people and has not heard from anyone yet!! That was on the 4th!! Said to please leave message if you get recorder!! [Follow-Up form dated 1/10/01]
>
> Called because no one contacted them about fee reductions.
>
> Concerned she hasn't rec'd a call back from svc rep re fee reduction. She called 1/8/01. Said I would fill out a 2nd fee reduction form but to hold on, someone would get back to her. She's worried she'll miss the deadline (1/23/01). Please call. [Follow-Up form dated 1/9/01]

(*Id.*, Exs. 2, 3.) The "processing fees" noted on these Follow-Up forms ranged from $21 to $1,540. (*Id.*, Exs. 2, 3, 6.)[5]

Ultimately, the shareholders who called Georgeson to complain obtained mixed results: some paid the entire fee; some paid a reduced fee; and some paid no fee because Georgeson waived it or made a referral to EquiServe.[6]

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[5] According to Georgeson's counsel, these are all the complaints received by Georgeson from US West shareholders. (Tr. Dec. 15, 2004 Hrg., p 10.)

[6] While it is undisputed that many (if not most) of the shareholders who complained to Georgeson ended up paying a full or reduced fee, the record does not give us exact figures. Nor do we know what each of the complaining shareholders was told by the Georgeson representative who placed the follow-up call. Several of the Follow-Up forms, however, do contain notes taken by the representative who made the return call (in

Other shareholders complained directly to AT&T. One sent an undated e-mail to David Dorman, then-president of AT&T, stating the following:

> I am a long time-holder of ATT&T [sic] stock and also a holder of 100 shares of Media One group. We received a notice from ATT&T about the acquisition of Media One. This in itself was O.K., but upon reading the details I want you to know I became quite upset. I can't believe a responsible person in the ATT&T organization would be willing to make the stock holders of Media [O]ne have to pay a commission of $7.00 per share for each share of ATT&T we are to receive for our Media One. Whoever made such a deal with the Georgeson Shareholder Securities Corp. should be immediately discharged. I have been involved in quite a few stock transaction[s] during the last fifty years and I can never recall a time when we had to pay such an enormous fee for handling a transaction such as this. I have always had respect and admiration for ATT&T but if they are going to continue to make deals like this ATT&T will certainly continue to deteriate [sic]. It is our intention to sell all of [our]

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addition to the notations from the original call). These notes indicate that one shareholder was told that her fee of $287 would be waived; one shareholder was told that his fee of $1,540 would be reduced by $400; three shareholders with fees of $267, $70, and $21, respectively, were given EquiServe's telephone number; one shareholder with a fee of $1,330 was "thinking about it" and remained "undecided"; and another with a fee of $21 was "not interested" in the program. The majority of the forms have no such "follow-up" notes. So, if no notes were taken, does it follow that the representative did not waive or reduce the fee, or refer the shareholder to EquiServe? In other words, does the absence of any "follow-up" notation mean that the call involved nothing more than an explanation of the processing fee, with an expectation that it would be paid? The record does not answer these questions. Nonetheless, what is important for purposes of summary judgment (more on this below) is that it is undisputed that many of the shareholders who called Georgeson to complain still ended up paying either the full or a reduced fee.

> ATT&T holdings as well [as] switch companies for our long distance provider.

(AT&T Ex. H.)[7] Patrick Anderson, Director of AT&T Shareowner Services, responded on January 12, 2001 with the following e-mail:

> Thanks for the message. I'm sorry for the confusion over this voluntary program currently offered by Georgeson for Mediaone [sic] shareholders who have still not exchanged their shares for AT&T shares. In order to reach these people and encourage them to exchange, we allowed Georgeson to develop this voluntary program. So far, approximately 10% of the eligible accounts have elected to exchange their shares through this program. At the end of the program, we expect about 25% of the eligible accounts to participate. Others such as yourself were upset about the voluntary program. Those people have been encouraged to proceed with their exchange directly through the transfer agent at no cost to the shareowner. Please remember that all Mediaone shareowners have already been' sent at least two requests asking them to exchange their shares for free through the transfer agent. We only use the voluntary programs because many of our shareowners enjoy paying for the convenience of this service which ends up costing the participants about 12% of their assets when you take into consideration the cash portion of the proceeds. If you wish to proceed with the free exchange of your Mediaone shares, please contact the transfer agent, EquiServe, at 800-348-8288. Thanks for your interest in AT&T.

(*Id.*)

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[7] We note that this e-mail was sent by a holder of MediaOne, and not US West stock. No matter. Although discovery was limited to US West shareholders, this e-mail was produced and we find it—and more importantly, AT&T's response—relevant to the present motions.

Another shareholder e-mailed the following to AT&T on January 14, 2001:

> I received a letter in Dec. 2000 from Georgeson Shareholder Com. requesting that I send my 629 shares of US West & Media One . . . to convert them into cash and AT&T shares. I want to convert the shares into ATT stock, however, am incensed that I will be penalized $7.00 per share to make this conversion. I do not believe I should be assessed this fee, since this is the first notification I have received re: stock conversion. Since 1946, I have been an ATT shareholder and loyal through all the changes since de-regulation; however, this may be the last straw. . . .

(AT&T Ex. I.) The e-mail made its way to Mr. Anderson, who forwarded it to another AT&T employee, with the following message:

> FYI- Please call . . . and explain the free option through EquiServe for exchanging her Mediaone [sic] shares. Also remind her she should have received two earlier notices about exchanging her shares. Perhaps we should verify her address too. Thanks.

(*Id.*)

This next e-mail was sent to AT&T, and Georgeson, on February 23, 2001:

> I read the following on Georgeson's web page: "In the ensuing six decades, Georgeson built a leadership position in the proxy solicitation industry by focusing on two core beliefs: 1) we will always be customer driven and our products and services must always add value to the client; and 2) we will always maintain our commitment to the highest ethical standards and the highest standards of business conduct." In my opinion your fees charged for exchanging shares of stock, for example $7

> to exchange US West Media Group to ATT plus cash, does not fit the code of ethical standards you express. If a shareholder has 1 to 20 shares, it might be [a] reasonable fee. But for those people who use Georgeson to exchange 200, 300, 400 shares, or maybe many more, the fee is outrageous. The[re] is little more work in exchanging 400 shares than 1 share, but a fee of $2800 for the work done would be extreme. I would hope that you would recognize that and charge according to a sliding fee scale that would be more realistic. I can only hope that there are not too many people that have opted to use your service for larger amounts of shares, under the auspices of major corporations who have hired you.

(AT&T Ex. H.) Mr. Anderson sent the following response on February 26, 2001:

> Thanks for your message below. The fee structure established for the unexchanged account program with Georgeson is designed to be simple and easy. Most of the unexchanged accounts have a small total value. Obviously, accounts with large numbers of shares would pay a much higher fee to use the services of Georgeson instead of handling the transaction on their own directly with the transfer agent. AT&T wants to make sure that former Mediaone [sic] and Media Group shareowners receive their entitlement as soon as possible. The Georgeson program material has been mailed to all of the shareowners (approximately 50,000) who for some reason have chosen not to respond to the earlier multiple mailings from our transfer agent, EquiServe, encouraging the exchange of their shares at no cost to the shareowner. Approximately 57% of the unexchanged Mediaone accounts and 39% of the unexchanged Media Group accounts have chosen to participate in the program offered by Georgeson. Georgeson has agreed to negotiate lower rates for shareowners who feel the $7

> per share fee is too high but still want to take advantage of Georgeson's assistance in exchanging their shares. Of course, shareowners can always handle the exchange on their own at no cost by contacting the transfer agent, EquiServe, as listed on the original mailings to all Media Group and Mediaone shareowners. If you have already participated in the Georgeson program and would like us to consider lowering the fee, please feel free to contact me to review your situation. Thanks for your interest in AT&T.

(*Id.*) The evidence is that any shareholder who complained directly to AT&T about the $7 fee was referred to EquiServe.

AT&T received regular status reports from Georgeson regarding the progress of the PMC, but there is no evidence that it was notified when Georgeson received a complaint about its processing fee. AT&T, on the other hand, appears to have kept Georgeson abreast of any complaints it received. Georgeson was copied on each of above e-mails sent to shareholders by Mr. Anderson. In response to a Georgeson status report (which is not part of the record), Mr. Anderson sent the following in a January 9, 2001 e-mail:

> Thanks for the update. I'm glad the program is going well. We have received several (10 or so) complaint letters about the high fees. We are simply advising the complainers that they may still exchange for free through the transfer agent if they wish to do the work themselves. Please insure that if people call to complain to GSC that they are provided with the toll free number at EquiServe so they may handle the work on their own. We do not expect GSC to do the exchange for complainers and waive the fee but that is up to GSC. Many people are not taking into consideration the cash portion and thinking of the $7 fee as a high (35%) portion of the assets instead of the more reasonable 12% of the assets including the cash. . . . We want to make sure GSC

> makes a reasonable profit on the program while keeping the cost as low as possible. In my opinion, . . . the program could still be profitable to GSC for a smaller per share fee (say $5 instead of $7). At the end of the program, we want to discuss the financial results with you to make sure the program was profitable for GSC while still keeping the fee as low as possible for future programs. . . . [W]e appreciate GSC's willingness to discuss the detailed financial results of the programs so that future programs can be designed to be both profitable and shareowner friendly. This is what makes for a good ongoing relationship between. GSC and AT&T. Thanks.

(*Id.*, Ex. F.)

In the end, of the 113,000 shareholders who received the December 15 notice, roughly 44,000 of them sent in their stock certificates pursuant to the Georgeson program, representing approximately 29% of US West shareholders and 44% of MediaOne shareholders. (Gavin Ex. 9.)

PROCEDURAL HISTORY

The procedural history of this case is rather involved, and was set out in detail in our opinion of November 26, 2003. *See Gavin v. AT&T*, 2003 WL 22849128, at *2-4 (N.D. Ill. Dec. 1, 2003). We will not repeat it in full here, but will provide a brief recap. On February 9, 2001, Gavin commenced this putative class action by filing in the Circuit Court of Cook County, Illinois a complaint against AT&T and Georgeson on behalf of herself and others who similarly exchanged their US West shares for AT&T shares through Georgeson. The complaint alleged four Illinois state law claims and expressly disavowed any claim for violation of the federal securities laws. In a nutshell, the complaint asserted that defendants fraudulently induced Gavin and the other alleged class members into exchanging their US West shares

through Georgeson for "commercially unreasonable and unnecessary fees" by failing to disclose the free means of exchange through EquiServe.

Defendants removed the action to the United States District Court for the Northern District of Illinois as preempted under the Securities Litigation Uniform Standards Act, 15 U.S.C. §§ 78bb(f), *et seq.* ("SLUSA"). The case was assigned to Judge John A. Nordberg. Gavin filed a motion to remand, which was denied, and defendants filed motions to dismiss, which were granted—all on preemption grounds. Gavin was given leave to file an amended complaint that asserted a claim under the federal securities laws.

Over the next *fifteen* months, Gavin made a series of unsuccessful attempts at obtaining appellate review of Judge Nordberg's dismissal order. Finally, on April 11, 2003, Gavin filed an amended complaint. The complaint re-alleged the four Illinois state law claims previously dismissed by Judge Nordberg, together with new "contingent" federal securities law claims. While reasserting representation of the purported US West class, Gavin's amended complaint alleged in the alternative a vastly expanded "nationwide" class defined as "all residents . . . who exchanged any company's certificates or shares and were charged a per-share fee by [Georgeson]." (Am. Compl., ¶ 42.)

One month later, the case was reassigned to our docket, and defendants moved to dismiss the amended complaint. We dismissed the state law claims, for the second time, as preempted by SLUSA. See Gavin, 2003 WL 22849128, at *4. As for the federal claims, Gavin had "curiously labeled [them] as 'contingent' counts, effective upon a final determination that these claims are preempted and governed by federal law." *Id.* at *4. Defendants claimed confusion over whether the "contingent" counts even purported to state a then-present claim, and moved to dismiss on that basis alone. After finding that "[*a*]*ll* parties know that there is nothing

'contingent' about Gavin's federal claims and that they are presently in play," we denied defendants' motions to dismiss those claims. *Id.* at *5. Gavin was given an opportunity to file a second amended complaint.

On December 10, 2003, Gavin filed a Second Amended Complaint, the incarnation now before the court (and hereafter, "the complaint"), with the same US West and alternative "nationwide" class allegations that were pled in the previous complaint. Count I alleges New York state law claims for constructive fraud and breach of fiduciary duty against AT&T and Georgeson for inducing putative class members to "exchange their certificates . . . on commercially unreasonable terms, when they otherwise would not have agreed to the proposed transaction had full and fair disclosure been made by Defendants." (Sec. Am. Compl., ¶ 34.) Count II claims violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ("Section 10(b)"), and Securities Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 ("Rule 10b5"), against both defendants for (i) failing to disclose the free alternative to exchanging shares through Georgeson, and (ii) representing that the shares had to be exchanged through Georgeson or would be lost. Count III, brought only against Georgeson, asserts (i) a violation of Section 10(b) and Rule 10b-5 for failing to disclose the total processing fee that would be incurred by exchanging shares through Georgeson, and (ii) a violation of Rule 10b-5 and National Association of Securities Dealers ("NASD") Rules for charging an "excessive mark-up" for the share exchange.

Defendants again moved to dismiss the complaint. This time, defendants attached in support of their motions several pieces of evidentiary material—including the June and August 2000 notices—consideration of which we believed would significantly advance the litigation. Having no basis to treat the documents as part of the pleadings, we converted defendants' motions to dismiss into motions for summary

judgment. *See Gavin*, 2004 WL 2260632, at *1. Presently before the court, then, are AT&T's and Georgeson's respective motions for summary judgment on the complaint in its entirety.

ANALYSIS

I. *Standard of Review*

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of establishing the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Should the moving party meet this burden, the non-moving party must "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 978 (7th Cir. 1996). A genuine triable issue exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there are "genuine issues of material fact," the court considers the evidentiary record in the light most favorable to the non-moving party, and draws all reasonable inferences in his favor. *See Lesch v. Crown Cork & Seal Co.*, 282 F.3d 467, 471 (7th Cir. 2002).

II. *Section 10(b) and Rule 10b-5 Claims*

Section 10(b) makes it unlawful for a person "to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b). Among those rules is Rule 10b-5, which "prohibits the making of any untrue statement of material fact or the omission of a material

fact that would render statements made misleading in connection with the purchase or sale of any security." *In re HealthCare Compare Corp. Sec. Litig.*, 75 F.3d 276, 280 (7th Cir. 1996).[8] To prevail on a Rule 10b-5 claim, a plaintiff must establish that the defendant: (i) made a false statement or omission, (ii) of material fact, (iii) with scienter, (iv) in connection with the purchase or sale of securities, (v) upon which the plaintiff justifiably relied, and (vi) the false statement or omission proximately caused the plaintiff's injury. *Otto v. Variable Annuity Life Ins. Co.*, 134 F.3d 841, 851 (7th Cir. 1998).

Congress intended Section 10(b) to be a "catchall antifraud provision," *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983), and to be "read flexibly, not technically and restrictively." *Superintendent of Ins. v. Bankers Life and Casualty*, 404 U.S. 6, 12 (1971). Liability will attach to any person who meets Section 10(b) and Rule 10b-5's required elements, regardless of that person's role in the fraud. *See Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1224 (10th Cir. 1996).

Counts II and III, taken together, assert four separate misrepresentations in violation of Section 10(b) and Rule

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[8] Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

10b-5. Three alleged misrepresentations—two omissions and one affirmative statement—were allegedly contained in the December 15 notice. The notice was misleading, according to Gavin, because it: (i) failed to disclose the free alternative to exchanging shares through Georgeson, (ii) failed to disclose the total processing fee that would be incurred, and (iii) represented that the shares had to be exchanged through Georgeson or would be lost. The fourth misrepresentation is defendants' agents alleged failure to disclose the EquiServe alternative to shareholders who called to complain about the fee. We begin with the notice.

A. Alleged Misrepresentations in the December 15 Notice

1. *Failure to Disclose Alternative Means of Exchange*

The nub of this case is Gavin's contention that by failing to disclose the EquiServe option in the December 15 notice (and in subsequent representations), AT&T and Georgeson misled US West shareholders into believing that participating in Georgeson's program was the only way to exchange their shares.

Defendants contend that the omission is not actionable under Rule 10b-5 and rely heavily on the case of *Starr v. Georgeson Shareholder, Inc.*, 287 F.Supp.2d 410 (S.D.N.Y. 2003). *Starr* is an almost identical case. AirTouch Communications shareholders who exchanged their shares for Vodafone shares through a Georgeson "post-merger clean-up," and incurred a $3.50 per share "processing fee," brought a class suit against Georgeson for omitting from its solicitation notice the fact that shares could be exchanged through Vodafone's exchange agent, EquiServe, free of charge. The Airtouch shareholders had been sent two mailings explaining the free EquiServe alternative prior to receiving the Georgeson notice. The court granted Georgeson's motion to dismiss:

> It is clear that the Georgeson communications did not state that shares could be submitted directly to the

> exchange agent, or by the addressees' broker or bank . . . . But the fact that there were alternative, and cheaper, methods of effecting the exchange did not render the Georgeson statements untruthful. Those statements were accurate as far as they went. Omissions "are only actionable where they cause the statements actually made to be misleading or if disclosure is required by a regulation or statute." *Castillo v. Dean Witter Discovery and Co.*, 1998 WL 342050, at *8 (S.D.N.Y. June 25, 1998), citing *Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2d Cir. 1992).
>
> Furthermore, the availability of the alternative means was already part of the "mix" of information readily available (in fact, mailed directly) to the AirTouch stockholders, who had been informed of the cost-free exchanges available through Equiserve, in Vodafone's two earlier mailings. "'The securities laws require disclosure of information *that is not otherwise in the public domain*,' not information that has already been publicly —indeed, officially—disclosed by the company." *Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 212 (4th Cir. 1994), quoting *Sailors v. Northern States Power Co.*, 4 F.3d 610, 613 (8th Cir. 1993).
>
> * * *
>
> Any AirTouch stockholder dissatisfied with the Georgeson proposition could with minimal diligence have investigated the already-disclosed alternative means of exchange. "An investor may not justifiably rely on a misrepresentation if, through minimal diligence, the investor should have discovered the truth." *Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020, 1032 (2d Cir. 1993).

287 F.Supp.2d at 413-14. Defendants forcefully argue that the reasoning in *Starr* applies equally to this case. We agree.

The *Starr* holding hinges, albeit implicitly, on Rule 10b-5's related requirements of materiality and, in the case of an omission, a duty to disclose. An omission is material under Rule 10b-5 if "there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Pommer v. Medtest Corp.*, 961 F.2d 620, 623 (7th Cir. 1992) (citations omitted). There is no evidence (or allegation) that Gavin or other US West shareholders did not receive the June or August 2000 notices which detailed the procedure for exchanging their shares at no cost through EquiServe. "[A] reasonable investor is presumed to have information available in the public domain, and therefore . . . is imputed with constructive knowledge of this information." *Whirlpool Financial Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995); *see also Panter v. Marshall Field & Co.*, 646 F.2d 271, 289 (7th Cir. 1981) ("[P]laintiffs cannot complain merely because [the defendant] did not reemphasize facts that . . . would have been known to the ordinary investor through papers of general circulation."); *Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 952 (2d Cir. 1978) ("[T]here is no duty to disclose information to one who reasonably should already be aware of it."); *Chu v. Sabratek Corp.*, 100 F.Supp.2d 827, 834 (N.D. Ill. 2000) ("A plaintiff cannot credibly claim to be misled by a company's attempt to hide negative information when that same information is publicly available via alternate channels."); *Debora v. WPP Group PLC*, 1994 WL 177291, at *8 (S.D.N.Y. May 5, 1994) (The federal securities laws "do not provide insurance for investors who either ignore or neglect the underlying public information. . . ."). If shareholders had questions, the June and August notices provided a toll-free telephone number for AT&T, and the December notice provided a toll-free number for Georgeson.[9] In sum,

[9] The fact that some shareholders may have later been misled by

because US West shareholders are deemed, as a matter of law, to have been aware of the twice-disclosed free exchange alternative, repeating that option in the Georgeson notice would not have "significantly altered the 'total mix' of information made available." *See Pommer*, 961 F.2d at 623. The omission of the EquiServe information from the December 15 notice was not material.

Moreover, there was no duty of disclosure. Rule 10b-5 imposes liability for an omission only when there is a duty to speak. *See Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1331 (7th Cir. 1995) ("Mere silence about even material information is not fraudulent absent a duty to speak."); *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1202 (1st Cir. 1996) ("The proposition that silence, absent a duty to disclose, cannot be actionably misleading, is a fixture in federal securities law."). A duty to disclose arises under Rule 10b-5 when an omission makes some existing statement misleading. *See* 17 C.F.R. § 240.10b-5 ("It shall be unlawful . . . to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.").

Gavin does not point to a specific statement in the notice rendered misleading by the omission. She argues instead that the notice, as a whole, was misleading in that it falsely suggested that Georgeson provided the exclusive means of exchange. As in the materiality analysis, whether the notice was misleading is evaluated in the context of all of the public information available to the US West shareholders. And when read in conjunction with the earlier EquiServe notices, the December 15 notice did not falsely indicate that there was no other way to effect an exchange. The notice explained the share exchange process, conspicuously disclosed the $7 fee,

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Georgeson's telephone agents, *see* discussion *infra*, does not support the claim that there was a material omission in the notice.

twice stated that the program was "voluntary," and provided a toll-free telephone number for shareholders with questions. At worst, the notice left open the question whether shareholders had to proceed with Georgeson, or could still exchange through EquiServe. The fact that there were questions does not mean that the notice was fraudulent under Rule 10b-5. Given the earlier EquiServe notices, the December 15 notice disclosed all that the federal securities laws require.[10] Accordingly, AT&T and Georgeson cannot be liable under Rule 10b-5 for failing to include the EquiServe option in the December 15 notice because there was no duty of disclosure and, alternatively, because the omission was not material.

2. *Failure to Disclose Total Amount of the Processing Fee*

Gavin's next claim, asserted only against Georgeson, is that its failure to disclose the total amount of the processing fee in the December 15 notice is an actionable omission. The notice clearly stated that the fee would be $7 for each share of AT&T to be received, and the claim card attached to the notice indicated the number of those shares. Georgeson's failure to perform the one-step multiplication required to ascertain the total fee is not an omission for which the securities laws provide redress. *See Starr*, 287 F.Supp.2d at

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[10] *Starr* can reasonably (even if wrongly) be read as holding that, even without the prior notices, there was no duty to disclose the cost-free option in the Georgeson notice because the omission did not render the notice literally untrue, *i.e.*, "[t]hose statements were accurate as far as they went." 287 F.Supp.2d at 413-14. To the extent that is the holding of *Starr*, we do not read the duty of disclosure under Rule 10b-5 so narrowly. A statement, though literally accurate, can still mislead investors through its context and manner of presentation. *See Lindelow v. Hill*, 2001 WL 830956, at *3 (N.D. Ill. July 20, 2001) ("[T]he disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead [investors].") Here, even though the statements in the December 15 notice were literally true, absent the June and August 2000 notices, it would at least be a jury question whether they nonetheless were misleading.

414. The securities laws are intended to require fair disclosure, but do not require corporations to "attribute to investors a child-like simplicity. . . ." *Basic, Inc. v. Levinson*, 485 U.S. 224, 234 (1988); *see also Ash v. LFE Corp.*, 525 F.2d 215, 219 (3d Cir. 1975) ("We decline to hold that those responsible for the preparation of proxy solicitations must assume that stockholders cannot perform simple subtraction.") This claim fails.

3. *Alleged Representation that the Shares Had to be Exchanged Immediately*

Gavin contends that both defendants, through the December 15 notice, misrepresented to shareholders that if they did not exchange their shares immediately, their shares would be deemed abandoned and escheat to the state authorities. Gavin points to the following language in the notice:

> We have retained Georgeson Shareholder Communications Inc. to assist you in claiming your shares and cash. We urge you to claim these shares now.
>
> * * *
>
> There is no benefit in continuing to hold your old shares. Eventually, if you continue to do nothing, your stock and underlying assets will be turned over to certain state authorities under the abandoned property laws.

(AT&T Ex. E.) While the notice does convey a sense of urgency, we fail to find an actionable misrepresentation. Each of the three notices sent to the US West shareholders contains some language urging them to respond. The additional warning in the December 15 notice of the eventual consequences of "doing nothing" is reasonable in light of the recipients' failure to respond to the earlier notices. *See Starr*, 287 F.Supp.2d at 413. Shareholders with questions were provided with a toll-free telephone number, and there is no evidence to suggest that shareholders were told that a failure to exchange

shares immediately would result in a forfeiture of their investment. Defendants are entitled to summary judgment on this claim as well.

In sum, there is no evidence from which a jury could reasonably conclude that the December 15 notice was fraudulent in violation of Rule 10b-5.

B. Failure to Disclose Alternative Means of Exchange When Shareholders Inquired About the Fee

In addition to alleging that the December 15 notice was misleading, Gavin claims that shareholders who spoke with defendants' agents after receipt of the notice were again misled, this time orally, into believing that Georgeson provided the exclusive means of exchange.

On this claim, AT&T and Georgeson are not in the same boat. The record shows that any US West shareholder who contacted AT&T to complain about the fee was told how to effect the exchange at no cost through EquiServe. Moreover, AT&T instructed Georgeson to do the same. Quite simply, we find no misrepresentation. AT&T is therefore entitled to judgment as a matter of law on the claim that it misrepresented to shareholders that Georgeson provided the only way to exchange their shares.

As for Georgeson, the record is less clear. It is undisputed that many of the shareholders who complained to Georgeson nonetheless ended up exchanging their shares through Georgeson and paying a fee, either in full or some reduced amount. According to Gavin, this creates a fact issue as to whether Georgeson agents misrepresented to these shareholders that they had no other exchange option. Georgeson presents a host of arguments, often overlapping, as to why it is entitled to judgment as a matter of law.

Georgeson's primary argument, again relying on *Starr*, is that just as it had no duty to disclose the EquiServe alterna-

tive in the notice, its telephone agents likewise had no duty of disclosure. Georgeson's reliance on *Starr* here is misplaced. The allegations of fraud in *Starr* were limited to what was said, or not said, in the notice. Once the court found that there was nothing fraudulent about the notice, that was the end of the matter. Indeed, the court assumed—and quite reasonably absent any allegations to the contrary—that any Airtouch shareholder who did inquire about the Georgeson exchange would not have been misled: "[a]ny stockholder dissatisfied with the Georgeson proposition could with minimal diligence have investigated the already-disclosed means of exchange." 287 F.Supp.2d at 414. What Gavin asserts is that US West shareholders *did* "investigate," but were once again misled to believe that Georgeson was the exclusive means of exchange. *Starr* has no relevance to these allegations.

Under Rule 10b-5, whether statements or omissions are misleading may depend on "the circumstances under which they were made." 17 C.F.R. § 240.10b-5. A statement or omission that is innocent in one context may become misleading in another. There was no duty to include the EquiServe information in the December 15 notice because, in the context of that notice, the omission did not render it misleading. The notice sought to inform shareholders of a "voluntary program" in addition to the already-disclosed EquiServe alternative. The fact that shareholders had questions on their available options does not make the notice misleading; the notice did not purport to answer those questions. But once shareholders called Georgeson to complain about the fee, invariably asking why or whether it had to be paid, Georgeson's agents had a duty of full disclose and omitting the most important piece of information, a free alternative, would be actionably misleading. *See Stransky*, 51 F.3d at 1331 ("If one speaks, he must speak the whole truth.")

Next, Georgeson argues that even if it had a duty of disclosure, Gavin "has not presented any evidence of stock-

holders affirmatively being told by GSCI that there was no alternative to the PMC program." (Georgeson Reply Br., p. 7.) This argument is defective on multiple levels. For starters, while it is true that Gavin has not presented any *direct* evidence of a Georgeson agent telling a shareholder that it provided the exclusive means of exchange, to prevail on summary judgment, or even at trial, Gavin does not necessarily have to do so. She has come forward with ample *circumstantial* evidence—namely, that shareholders called to complain, spoke with a Georgeson representative, and still ended up paying a fee they wanted to avoid—which, if believed, could lead a jury to reasonably conclude that Georgeson agents misrepresented to shareholders that it provided the exclusive means of exchange.

Moreover, Georgeson assumes that as long as shareholders were not "affirmatively being told by GSCI that there was no alternative to the PMC program," it escapes liability under Rule 10b-5. Not so. Rule 10b-5 does not require an out-and-out lie. If, as Gavin alleges, Georgeson agents omitted to tell shareholders who were seeking to avoid the fee about the cost-free alternatives, such an omission may be actionable. *See Tricontinental Indus. Ltd. v. Anixter*, 215 F.Supp.2d 942, 948 (N.D. Ill. 2002) ("Rule 10b-5 prohibits more than statements that are facially false; it prohibits the omission of a material fact that would render statements made misleading.") (citation omitted); *Charles Hughes & Co. v. Securities and Exch. Comm.*, 139 F.2d 434, 437 (2d Cir. 1943) ("The law of fraud knows no difference between express representation on the one hand and implied misrepresentation or concealment on the other.")

Georgeson's third argument is that because it fulfilled its obligations under the PMC Agreement's referral provision, it did all that the law requires. The Agreement provides: "During the program, if any shareholder contacts GSC inquiring about how they can contact the transfer agent directly to

facilitate their exchange, GSC will direct them to the transfer agent without charge." (AT&T Ex. D.) Georgeson reads the provision narrowly as obligating it "to provide stockholders with EquiServe's contact information if asked." (Georgeson Reply, p. 7 n. 8.) First, Georgeson's obligations to AT&T under the PMC Agreement, whatever they were, are irrelevant to its obligations to US West shareholders under the federal securities laws. And to the extent Georgeson is arguing that its duties under the Agreement are coextensive with those under Rule 10b-5, it is mistaken. A brief example illustrates the point. In one of the complaints summarized above, a shareholder "asked if there was a way to avoid this." (Gavin Ex. 2.) Under Georgeson's reading of the provision, and maybe even a plain reading, it is not clear that there is an obligation to notify the shareholder of the EquiServe alternative. After all, the shareholder did not expressly ask for EquiServe's contact information. Under Rule 10b-5, however, there would be a clear duty to disclose the alternative cost-free means of exchange. Georgeson's obligations under the PMC Agreement, and whether they were met, are irrelevant to whether it may be liable under Rule 10b-5.

For its fourth argument, Georgeson maintains that Gavin has not presented adequate evidence of its "scienter." To satisfy the scienter requirement of Section 10(b) and Rule 10b-5, a plaintiff must demonstrate that a defendant either had "the intent to deceive, manipulate or defraud," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976), or a "reckless disregard for the truth of the material asserted whether by commission or omission." *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1044 (7th Cir. 1977). "Reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id.* at 1045. This argument

need not detain us long. Here, a strong inference of scienter follows closely from the evidence of Georgeson's agents' misrepresentations. The evidence is that many shareholders who telephoned Georgeson to object to the fee nonetheless ended up paying it. If this is sufficient to raise a triable issue on whether the agents failed to inform shareholders of the EquiServe choice, and it is, then it also raises a genuine issue on the scienter element because it is at least as likely as not that the agents were extremely reckless if indeed they omitted to disclose the free alternative. Georgeson's scienter argument does not move us.

Finally, Georgeson contends that even if its agents *did* mislead shareholders, those oral statements or omissions are "trumped" by the existing written EquiServe notices. The cases cited by Georgeson—*Acme Propane, Inc. v. Tenexco, Inc.*, 844 F.2d 1317, 1322 (7th Cir. 1988) and *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 530 (7th Cir. 1985)—stand for the basic proposition that under the securities laws, a written disclosure will control over any inconsistent oral statement. The rationale for the principle was explained in *Acme Propane*:

> [T]he securities laws are designed to encourage the complete and careful written presentation of material information. A seller who fully discloses all material information in writing should be secure in the knowledge that it has done what the law requires. Just as in the law of contracts a written declaration informing one party of an important fact dominates a contrary oral representation, so in the law of securities a written disclosure trumps an inconsistent oral statement. Otherwise even the most careful seller is at risk, for it is easy to claim: "Despite what the written documents say, one of your agents told me something else." If such a claim of oral inconsistency were enough, sellers' risk would be

> greatly enlarged. All buyers would have to pay a risk premium to cover this extra cost of doing business.

844 F.2d at 1322. According to Georgeson, then, even if its agents misled shareholders to believe it provided the exclusive means of exchange, those statements (or omissions) are not material because the EquiServe alternative was already disclosed. *Acme Propane*, however, placed an important limitation on the written disclosure rule: "we shall insist that the written words be true, clear, and complete, in order to be dispositive." 844 F.2d at 1325. This qualification is not satisfied here. If a complaining shareholder was told by a Georgeson agent that "this is the only way to go," there was nothing in an earlier written disclosure that "clearly" and "completely" contradicted that statement. Indeed, as discussed *supra*, even a shareholder with all of the notices in front of him might still reasonably wonder what his exchange options were. This is not a case in which shareholders, in relying on Georgeson agents' oral representations, closed their eyes to a plain written provision that should have alerted them to the falsity of those representations. The written disclosure rule does not apply here.

In the end, Georgeson's most compelling argument is one that it appears to have been abandoned. At a status hearing on December 15, 2004, Georgeson's counsel stated: "Well, there are—there are reasons, your Honor, and I believe we've set them forth in our motion, and we'll reply—as to why someone would decide to pay a fee as opposed to doing something for free." (Tr. Dec. 15, 2004 Hrg., pp. 14-15.) These "reasons" have not surfaced. Obviously, if there were evidence that Georgeson offered some service or benefit not provided by EquiServe, then a factfinder might naturally infer that complaining shareholders participated in the Georgeson program because they desired to take advantage of that service. Without that evidence, however, there is a question for the jury whether the reason shareholders would forego the

EquiServe option in favor of Georgeson's program is simply because the shareholders were not told about, or that they could still participate in, the EquiServe exchange.

III. *Excessive Mark-Up Claim*

Gavin claims that Georgeson's exacting of a $7 per share fee constitutes an "excessive mark-up" in violation of NASD Rules and Rule 10b-5. Broker-dealers often charge their customers a mark-up over a security's prevailing market price as compensation for effecting a stock trade. For example, when the securities purchased (or here, exchanged) have a market value of $10,000, and the broker charges its customers $500, the mark-up is $500, or five percent. NASD Rules prohibit broker-dealers from charging "excessive" mark-ups,[11] and several circuits have recognized a private right of action under Section 10(b) and Rule 10b-5 against a broker-dealer who fails to disclose an excessive mark-up. *See Grandon v. Merrill Lynch, & Co.*, 147 F.3d 184, 189-90 (2d Cir. 1998); *Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1033 (4th Cir. 1997); *Bank of Lexington E. Trust Co. v. Vining-Sparks Sec. Inc.*, 959 F.2d 606, 613 (6th Cir. 1992).

Georgeson moves for summary judgment on one argument: it is not a broker-dealer. The parties do not dispute that an "excessive mark-up" claim is premised on a duty owed by, and therefore can only be asserted against, a broker-dealer. *See Bissell v. Merrill Lynch & Co.*, 937 F.Supp. 237, 246 n. 7 (S.D.N.Y. 1996) ("[A] broker-dealer, by holding itself out as competent to conduct a brokerage business, owes its customer certain duties, including the duty not to sell securities at prices far in excess of market prices.").

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[11] Mark-ups for equity securities greater than 5% above the prevailing market price generally are considered to be unreasonable, and thus violative of NASD Rules. *See* NASD Conduct Rule 2440; Guideline IM-2440.

Georgeson proffers the affidavit of Ronald M. Boronkay, its Executive Vice President, which states, *inter alia*, that "GSCI is not a broker-dealer." (Boronkay Decl., p. 1.) In response, Gavin points to the PMC Agreement, which provides: "The exchanging shareholders will be charged a processing fee by GSC's broker-dealer subsidiary, Georgeson Shareholder Securities Corporation, as mutually agreed upon by T and GSC." (AT&T Ex. D.) Gavin also submits what it refers to as "Georgeson's" broker-dealer registration. (Pl. Mot. Dismiss, Ex. 2.) The registration, however, is in the name of "NASD Member Firm Georgeson Shareholder Securities Corp." (*Id.*) Finally, Gavin attaches an excerpt from Georgeson's website in support of her argument that Georgeson "touts itself" as a broker-dealer. But, again, the website only refers to Georgeson's "broker dealer subsidiary." (Pl. Mot. Dismiss, Ex. 1.) Nothing that Gavin has submitted rebuts Georgeson's credible evidence that it is not a broker-dealer. Her evidence only demonstrates that a Georgeson subsidiary, Georgeson Shareholder Securities Corporation ("GSSC"), is a NASD-registered broker-dealer. Gavin's muddling of the distinction between the two entities by using "Georgeson" interchangably does not create a fact issue. The record is clear—Georgeson is not a broker-dealer.[12]

There are other problems with this claim that have been overlooked and that cannot be cured by an amendment. A broker-dealer may be liable under Rule 10b-5 for charging an excessive mark-up, but only when the mark-up is not disclosed. It is not the fact that the fee is excessive that triggers the antifraud provisions of the federal securities laws;

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[12] Gavin is aware that Georgeson and GSSC are separate corporations. *See* Sec. Am Compl., ¶ 46 ("Georgeson (especially its GSSC subsidiary, a registered broker-dealer) . . . ."); *see also* December 15 notice ("[A] fee of $7 per AT&T share due you will be . . . paid to Georgeson Shareholder Securities Corporation, member of NASD and SIPC.").

it is the fact that it is hidden. *See Grandon*, 147 F.3d at 193 ("[W]e must also seek, under § 10(b) and Rule 10b-5, to protect customers from paying excessive markups that, *because they remain undisclosed*, are fraudulent.") (emphasis added.) Here, the $7 fee was disclosed, so Rule 10b-5 does not come into play.

Gavin correctly points out that charging a mark-up that is excessive will violate NASD Rules, even if it is disclosed. *See* NASD Rule IM-2440(b)(5) ("Disclosure itself . . . does not justify a commission or mark-up which is unfair or excessive in light of all other relevant circumstances."). What Gavin fails to recognize, however, is that there is no private right of action for the enforcement of exchange rules. *See Spicer v. Chicago Board of Options Exchange, Inc.*, 977 F.2d 255, 266 (7th Cir. 1992). Accordingly, because Georgeson is not a broker-dealer, and just as fundamental, because neither Rule 10b-5 nor the NASD Rules provide an avenue for relief, Gavin cannot prevail on her excessive markup claim.

IV. *State Law Claims*

Gavin alleges state law claims against both AT&T and Georgeson for breach of fiduciary duty and constructive fraud. Twice already, once by Judge Nordberg and again by this court, Gavin's claims for breach of fiduciary duty and constructive fraud (along with three other state law claims) have been dismissed as preempted by SLUSA.

The allegations in the present claims are substantively identical to those asserted in the twice-dismissed counts. But instead of being pled under Illinois law, they are now brought under the law of New York. By recasting his claims under New York law, Gavin attempts to bring them within the so-called "Delaware carve-out," a provision of SLUSA which "preserves," or exempts from preemption, certain "covered class actions" that are based on the law of the stock issuer's state of incorporation:

(1) Actions under State law of State of Incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated . . . may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this clause if it involves—

(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that—(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and (bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

15 U.S.C. § 78bb(f)(3)(A)(ii).

The "Delaware carve-out" does not apply to Gavin's claims against either defendant. It does not cover the claims against Georgeson: the claims are based on New York law; Georgeson is a Delaware company. *See Greaves v. McAuley*, 264 F.Supp.2d 1078, 1084 (N.D. Ga. 2003). AT&T is a New York company, but the other statutory criteria are not satisfied. As for subpart (I), although this action "involves . . . the purchase or sale of securities," the purchase or sale was not made "by the issuer or an affiliate of the issuer *exclusively*

from or to holders of equity securities of the issuer." 15 U.S.C. § 78bb(f) (3) (A) (ii) (I) (emphasis added). As a result of the merger of AT&T and MediaOne, holders of MediaOne and US West shares acquired AT&T stock by exchanging their MediaOne or US West shares for shares of AT&T. Any sale of AT&T stock under the PMC was made to MediaOne and US West shareholders, not to existing AT&T shareholders.

Under subpart (II), the complaint's allegations do not concern decisions of AT&T shareholders "with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights." 15 U.S.C. § 78bb(f) (3) (A) (ii) (II) (bb). This suit involves a post-merger cleanup program that was conducted well after any communications had been made regarding decisions of shareholders acting in response to a tender or exchange offer. Accordingly, Gavin's state law claims are, once again, dismissed as preempted by SLUSA.[13]

CONCLUSION

In summary, AT&T's motion for summary judgment is granted on all Counts. Georgeson's motion for summary judgment is granted on Counts I and III, and on Count II to the extent it alleges that the December 15 notice was misleading in violation of Rule 10b-5. What remains, then, is the allegation in Count II that Georgeson's telephone agents misled shareholders, in violation of Rule 10b-5, into believing

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[13] Even if Gavin's state law claims were not preempted by SLUSA, they would be precluded by New York's "blue sky" law, the Martin Act, N.Y. Gen. Bus. Law § 352-c, which forecloses a private right of action for breach of fiduciary duty or constructive fraud in the context of securities transactions, reserving all enforcement responsibilities to the state attorney general. *See Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 190 (2d Cir. 2001) (affirming dismissal of breach of fiduciary duty claim as barred by Martin Act); *Eagle Tenants Corp. v. Fishbein*, 182 A.D.2d 610, 611, 582 N.Y.S.2d 218 (N.Y. App. Div. 1992) (constructive fraud).

that it provided the exclusive means of exchanging their shares.

The result of today's opinion is that the only named plaintiff, Gavin, has no claim. The individuals who may have claims are only the putative class members who made telephone inquiries of Georgeson. This means, of course, that Gavin is not suited to be the lead plaintiff of the class. Status is set for June 22, 2005, at 11:00, at which counsel should be prepared to discuss these and other issues related to class certification.

DATE: June 7, 2005

ENTER: /s/ John F. Grady,
JOHN F. GRADY, United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 2721

Judge Nordberg
Magistrate Judge Keys

LILA T. GAVIN, on behalf of herself
and all others similarly situated,
Plaintiff,

v.

AT&T CORP., a New York Corporation, and
GEORGESON SHAREHOLDER COMMUNICATIONS, INC.,
a Delaware Corporation,
Defendants.

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiff, Lila T. Gavin, individually and on behalf of the class of persons defined below, for her complaint alleges, upon knowledge as to herself and her own acts, and certain acts of others, and otherwise upon information and belief, as follows:

I. *NATURE OF THE CASE*

1. This case is brought on behalf of holders of unexchanged certificates or shares of U.S. West Media Group Common Stock, as set forth in detail in the class definition contained herein. As alleged herein, Defendants AT&T Corp. ("AT&T") and Georgeson Shareholder Communications, Inc. ("Georgeson"), knowingly and intentionally misrepresented or otherwise failed to disclose material facts including, inter

alia, that Plaintiff and other holders of unexchanged certificates or shares of U.S. West Media Group could exchange their U.S. West Media Group certificates or shares for AT&T certificates or shares and cash at no cost, resulting in damage to Plaintiff and other shareholders who exchanged their certificates or shares in response to Defendants' false and misleading offer to exchange them for a fee of $7.00 a share. Defendants' wrongful conduct violates the Illinois Consumer Fraud Act, 815 ILCS 505/1 et seq. and similar laws in the forty-nine other states and the District of Columbia.

II. *JURISDICTION AND VENUE*

2. *Jurisdiction.* This case was originally filed in Illinois State Court which has jurisdiction over this litigation pursuant to Illinois Code of Civil Procedure, 735 ILCS 5/2209(b)(4). Defendants, AT&T and Georgeson, are corporations doing business in this State. However, per this court's determination, this Court has jurisdiction over this litigation pursuant to section 27 of the Securities Exchange Act of 1934 as amended (hereinafter referred to as "the Exchange Act"), as codified 15 U.S.C. § 78aa, 28 U.S.C. § 1331, and also 28 U.S.C. § 1332 and 28 U.S.C. § 1367, and because the contingent claims arise under sections 10(b) of the Exchange Act and Securities and Exchange Commission Rule 10b-5.

3. *Venue.* Venue is proper in Illinois under Illinois Code of Civil Procedure, 735 ILCS 5/2-101 and 5/2-202 and in this federal district because defendants, AT&T and Georgeson, are both foreign corporations doing business in, and maintaining registered agents in Cook County, Illinois. However, based on this Court's determination that the exchange of the certificates or shares was in connection with a purchase or sale, venue is proper in this court under 28 U.S.C. § 1391 (a), (b), and (c), and section 27 of the Exchange Act. Many of the transactions occurred here and had their effects in this district and Defendants are both foreign corporations doing business in, and maintaining registered agents in this district.

III. *PARTIES*

4. *Plaintiff*

a. Plaintiff Lila T. Gavin is a resident of Oak Lawn, Illinois. Ms. Gavin owned at all relevant times hereto a total of 235 unexchanged U.S. West Media Group certificates or shares. Ms. Gavin exchanged her certificates or shares of U.S. West Media Group pursuant to the offer of defendant AT&T, through its authorized agent, Georgeson, for 0.95 AT&T shares per U.S. West Media Group share plus cash and was damaged thereby, including, *inter alia*, being charged a fee of $7 per AT&T share due her.

5. *Defendants*.

a Defendant AT&T Corp. is a New York corporation with its principal place of business in New York, New York.

b. Defendant Georgeson Shareholder Communications, Inc., is a Delaware corporation with its principal place of business in New York, New York.

IV. *CLASS ALLEGATIONS*

6. This action is brought and properly maintained as a class action pursuant to Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure on behalf of a Class (the "Class") of all others similarly situated, as defined herein.

7. *Class Definition*. Plaintiff requests certification of a nationwide Class. If, however, the Court determines that a nationwide Class is not appropriate or otherwise cannot be maintained, then, alternatively, Plaintiff requests certification of the case to proceed for such limited Class as this court may determine, defined as either:

(a) *Nationwide Class*: "All residents, or persons or legal entities deemed to be residents, of the fifty states and the District of Columbia, other than employees, officers and directors of Georgeson Shareholder Communications, Inc.,

who were charged a per-share fee by Georgeson Shareholder Communications, Inc. upon the reissuance of certificates under Georgeson's "post-merger cleanup" program.

(b) *Nationwide AT&T/US. West merger sub-class*: "All residents, or persons or legal entities deemed to be residents, of the fifty states and the District of Columbia, other than employees, officers, and directors of AT&T Corp. and Georgeson Shareholder Communications, Inc., who were charged a per-share fee by Georgeson Shareholder Communications, Inc. for exchanging their certificates or shares of U.S. West Media Group for certificates or shares of AT&T and cash.

8. *Numerosity*. Although the exact number of Class members is unknown to Plaintiff, the Class (either of persons who have paid per-share exchange charges to Georgeson on either (a) any merger/reorganization or (b) on the U.S.West/AT&T merger) likely numbers some thousands of persons residing throughout the United States, making joinder of all Class members impracticable.

9. *Common Questions of Law and Fact*. A multitude of questions of law and fact are common to Plaintiff's claims and those of Class members. The common questions– all focused on the legality of Georgeson's charging a per-share, rather than per-certificate charge for ministerial certificate exchanges, and the manner in which it is done—predominate over any questions affecting only individual Class members and include, inter alia, the following:

(a) Whether Defendants intentionally concealed the fact that an exchange of U.S. West Media Group shares could be made at no cost;

(b) Whether Defendants misrepresented that shareholders need exchange their U.S. Media Group shares through AT&T's authorized agent, Georgeson;

(c) Whether Defendants misrepresented to U.S. West Media Group shareholders that their only choice was to exchange their U.S. West Media Group shares through Georgeson, while failure to exchange their shares through Georgeson would only result in their shares being deemed abandoned and escheating to the State;

(d) Whether Defendants' conduct was actionably deceptive;

(e) Whether Defendants' conduct, violated Section 10(b) of the Exchange Act and Rule 10b-5;

(f) What is the proper amount and measure of damages awardable to Plaintiff and the Class.

10. *Typicality of Claims.* Plaintiff's claims are typical of members of the Class. Plaintiff and other Class members exchanged their certificates or shares in response to the false and misleading direction of Defendants to exchange their shares of U.S. West Media Group for a fee of $7.00 per share. Plaintiff is a member of each proposed Class.

11. *Adequate Representation.* Plaintiff will adequately, vigorously and fairly represent and pursue the interests of the Class members. Plaintiff understands the nature of her claims described herein. Plaintiff's claims are consistent with, and not antagonistic to, the claims of other members of the Class. Plaintiff does not have any disqualifying conditions. Plaintiff's lead counsel, Clinton A. Krislov and Krislov and Associates, Ltd., have substantial experience in representing consumers and investors in class actions, and will vigorously pursue the claims for Plaintiff and the Class.

12. *Appropriateness of a Class Action.* Litigation of this action on a classwide basis is an appropriate method for the fair and efficient adjudication of the claims alleged herein. Class treatment is superior to other available methods for the fair and efficient adjudication of the controversy alleged herein. Allowing this action to proceed as a class action will permit a large number of similarly situated persons and en-

tities to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would inevitably require. Class action treatment will also permit the adjudication of relatively small claims of Plaintiff and other Class members, who could not individually afford to litigate a complex claim against well-heeled corporate defendants such as those herein. Furthermore, even for those Class members who could afford to litigate such a claim, it would still be economically impractical, as the cost of litigation is almost certain to far exceed any recovery they might obtain.

13. *Manageability*. Plaintiff is unaware of any difficulty likely to be encountered in the management of this case that would preclude its maintenance as a class action.

14. Certification under New Rules 23(c) and (g).

In compliance with Rule 23(c)(1)(A), the court should certify the Class as previously defined, with respect to the common issues described above, with undersigned counsel as Class Counsel under Rule 23(g). As contemplated by Rule 23(g), undersigned counsel has identified and investigated potential claims in the action, is amply experienced in handling class actions, other complex litigation, and claims of the type asserted in the action, is knowledgeable of the applicable law, and will commit all necessary resources to representing the Class.

V. *SCIENTER*

15. Defendants were aware of or recklessly disregarded the fact that their notice and representations to the Plaintiff were intentionally misleading, deceiving the Plaintiff and other members of the Class to believe that they had no other choice than to exchange the shares through Georgeson and pay the extra fee or lose their interests entirely.

16. Georgeson had a strong motive to mislead Plaintiff and other members of the Class to believe that they were obligated to effect the transaction through Georgeson, because Georgeson charged and received $7 per-share revenue if the certificate reissuance was done through Georgeson, but was still being done without charge, if done through the Company issuer itself or its transfer agent. AT&T had a strong motive to mislead Plaintiff and the Class to the same effect, based on its desire to induce them to turn in their old certificates, to clean up its records.

VI. *SUBSTANTIVE ALLEGATIONS*

17. In 1998, U.S. West Media Group was split off from U.S. West. Shares of U.S. West Media Group were then exchangeable for Media One shares on a one-for-one basis.

18. Subsequently, in June, 2000, Media One merged with AT&T. Following the merger, Plaintiff's and other U.S. West Media Group shareholders' shares were converted into rights to receive 0.95 shares of AT&T and a cash payment of $36.27 for every U.S. West Media Group share they held, plus all accrued dividends paid on these shares.

19. On December 15, 2000, AT&T, through its authorized agent Georgeson, through the use of misrepresentations and/or omissions of material fact, solicited Plaintiff and other members of the Class to exchange their certificates or shares of U.S. West Media Group for shares of AT&T and cash as described above.

20. Defendants falsely represented to Plaintiff and other members of the Class that they *had* to send in their U.S. West Media Group share certificates to Georgeson to receive certificates for their shares or face losing their investment entirely:

QUESTIONS AND ANSWERS

1. Why do I have to send in my U.S. WEST Media Group ("Media Group") stock certificate(s)?

> In 1998, Media Group was split off from U.S. West, Inc. and exchanged into MediaOne on a one-for-one basis. Subsequently, in June 2000, AT&T Corp. acquired MediaOne. As a result, your old shares are no longer traded. You now need to send in your "old" Media Group certificate(s) for the AT&T shares due you, plus cash payment and back dividends. If you do not claim your AT&T stock and cash, eventually they will be turned over to state authorities under the abandoned property laws.

Important Notice for Holders of Unexchanged Share of U.S. West Media Group Common Stock (December 15, 2000) ("Notice").

21. Defendants represented to Plaintiff and other members of the Class that, based upon AT&T's $22 price per share on December 14, 2000, each share of U.S. West Media Group would receive merger consideration of approximately $59 per share. The number of U.S. West Media Group shares owned by Plaintiff and other members of the Class and the number of AT&T shares and cash payment due them were recorded on the uniform solicitation sent to holders of unexchanged shares of U.S. West Media Group.

22. The uniform solicitation sent to Plaintiff and other members of the Class was false and misleading insofar as it omitted to disclose that the $7 per share charge was commercially unreasonable and could be avoided altogether if shareholders exchanged their certificates or shares directly through AT&T's Shareowner Services. Indeed, AT&T actually did perform these certificate exchanges for free if a shareholder did so.

23. The uniform solicitation was false and misleading in that it failed to disclose the confiscatory impact of the $7 per share service charge which, in the case of Plaintiff, cost her hundreds of dollars in cash for a ministerial certificate

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reissuance that was already due her by AT&T under the terms of the merger. Instead, Defendants intentionally used scare tactics to induce Plaintiff and other members of the Class to exchange their certificates or shares immediately and exclusively through Georgeson, intending that they rely on their false and misleading statements that an exchange must be made immediately and exclusively through Georgeson, to avoid losing their investment:

> We have retained Georgeson Shareholder Communications Inc. to assist you in claiming your shares and cash. We urge you to claim these shares now.
>
> * * *
>
> There is no benefit in continuing to hold your old shares. Eventually, if you continue to do nothing, your stock and underlying assets will be turned over to certain state authorities under the abandoned property laws.

Notice.

24. Defendants' uniform solicitation was false and misleading insofar as it failed to disclose the commercial unreasonableness of the $7 per share charged imposed by AT&T through its authorized agent, Georgeson. The charge was also mis-represented as merely incidental to the transaction and otherwise a necessary cost to shareholders who wished to "claim" their AT&T shares and cash:

> We have retained Georgeson Shareholder Communications Inc. to assist you in claiming your shares and cash. We urge you to claim these shares now. You may choose to have the AT&T shares due you sold on the open market or have them sent to you. *To defray the cost of providing you with this service, a processing fee of $7 per AT&T share due you will be deducted from the additional cash payment of $36.27 per US WEST Media Group [sic] share you are due, and paid to Georgeson*

Shareholder Securities Corporation, member of NASD and SIPC.

Notice. Contrary to the affirmative representations of Defendants, the $7 per share "processing fee" far exceeded the cost of providing this "service," which, unbeknownst to Plaintiff and other members of the Class was available at no cost through AT&T's Shareowner Services.

25. Georgeson's "post-merger clean-up"(sm) business is a largely profitable portion of Georgeson's business, touted as having been "invented" by Georgeson "to reunite as many as 90% of unexchanged shareholders with their rightful assets, all at no cost to our clients," the issuer corporations. *http://www.georgeson.com/htm1/06.asp*. However, the "post-merger cleanup" is at significant cost to individual shareholders who are mislead by Defendants as to the avenues they can take to exchange their certificates.

26. The confiscatory $7 per share fee withheld by Defendants was devastating to Plaintiff and other members of the Class, amounting to more than 19% of the $36.27 cash payment due shareholders per U.S. West Media Group share exchanged. Despite their representation that this was merely a "processing fee" necessary to "defray the cost" of service, the $7 per share is a highly profitable source of revenue for Georgeson Shareholder Communication, aided by the threats of AT&T and Georgeson that a failure to respond would result in a greater loss: the complete loss of Plaintiff's and other Class members initial investment and capital gains.

27. Also of material importance, but which Defendants failed to disclose, is the fact that even if Plaintiff and other members of the Class "continue[d] to do nothing," and their "stock and underlying assets [were] turned over to certain state authorities under the abandoned property laws," (Notice) the cost of reclaiming those assets would be far less, and perhaps nothing.

VII. *CAUSES OF ACTION*

COUNT I

(Breach of Fiduciary Duty and Constructive Fraud—New York law)

28. Plaintiff repeats and realleges the allegations contained in the Paragraphs 1 through 27 *supra*, as if fully set forth herein.

29. Defendants undertook to review the investments of, and to provide advice and counsel to, Plaintiff and other U.S. West Media Group shareholders regarding what would be in the shareholder's best interests.

30. Plaintiff and other members of the Class generally had no prior training, expertise or knowledge concerning the exchange of stock pursuant to the terms of a merger and relied solely upon the advice and knowledge of Defendants.

31. By virtue of the relationship of the parties hereto, coupled with the vastly superior knowledge and bargaining position of Defendants, a confidential or fiduciary relationship arose between Plaintiff and other members of the Class on the one hand and Defendants on the other.

32. Plaintiff and other members of the Class reposed their trust and confidence in Defendants and relied on their advice and expertise.

33. Defendants knew or should have known that Plaintiff and other members of the Class placed their trust and confidence in Defendants, who accepted the confidence and trust reposed in them by Plaintiff and other members of the Class.

34. Plaintiff and other members of the Class were induced to exchange their certificates for either (a) shares of U.S. West Media Group for AT&T shares and cash or (b) other companies, on commercially unreasonable terms, when they otherwise would not have agreed to the proposed transaction had full and fair disclosure been made by Defendants.

35. Defendants have breached their fiduciary duties to Plaintiff and o[illegible] members of the Class by their misrepresentations and [illegible]missions of material fact described herein in connection with the offer to exchange their certificates.

36. As a direct and proximate result of the foregoing, Plaintiff and other members of the Class have suffered damage in an amount to be determined at trial.

COUNT II

Violation of Section 10(b) of the Exchange Act and Rule 10b-5 Against All Defendants.

37. Plaintiff repeats and realleges the allegations contained in the Paragraphs 1 through 36 *supra*, as if fully set forth herein.

38. Defendants, AT&T and Georgeson, implemented a "manipulative and deceptive device, scheme or artifice to defraud" Plaintiff and other members of the Class in violation of SEC Rule I Ob-5(a); failed to disclose material facts that would make the representations not misleading, in violation of SEC Rule 10b-5(b); and, engaged in practice in connection with the exchange of shares which was fraudulent or deceitful in violation of SEC Rule 10b-5(c).

39. Defendants employed deceptive or manipulative devices by sending uniform misleading notices to shareholders as part of Defendants scheme to induce Plaintiff and other members of the Class to exchange their certificates or shares for commercially unreasonable and unnecessary fees.

40. Defendants failed to inform Plaintiff and other members of the Class that they could exchange their certificates or shares at no cost through the appropriate transfer agent, but instead mislead them to believe that they must perform the exchange through Georgeson otherwise they would lose their interest entirely.

41. The misleading statements by Defendants were all historical or then-existing statements and therefore, the statutory safe harbor provision for forward-looking statements does not apply to Defendants' representations.

42. As a direct and proximate result of the foregoing, Plaintiff and other members of the Class have suffered. damages in the amount to be determined.

COUNT III

Violation of Section 10(b) of the Exchange Act and Rule 10b-5 Against Defendant Georgeson: Excessive Markup"

43. Plaintiff repeats and realleges the allegations contained in the Paragraphs 1 through 42 *supra*, as if filly set forth herein.

44. Defendant failed to disclose material facts that would make the representations not misleading, in violation of SEC Rule 10b-5(b). Georgeson failed to inform shareholders that they could obtain the exchange of their certificates or shares directly through the transfer agent for no cost and Georgeson failed to make clear the total "processing fee" by using Georgeson's services.

45. Georgeson had a duty to disclose material information that a reasonable shareholder would need to know to make an informed decision as to how to handle the exchange of their certificates or shares. When a broker-dealer such as Georgeson implements an excessive mark-up price per share of the stock to be transferred or exchanged, then that Broker dealer has a duty to inform shareholders of the mark-up so that they can make an informed decision about whether to become involved in the transaction.

46. Georgeson (especially its GSSC subsidiary, a regitered broker-dealer) was on notice of the deceptive and wrongful nature of its conduct by virtue of various NASD rules of conduct for brokers. NASD Rule 2430 requires that

"[c]harges, if any, for services performed, including miscellaneous services such as collection of moneys due for principal, dividends, or interest; exchange or transfer of securities; appraisals, safe-keeping or custody of securities, and other services, shall be reasonable and not unfairly discriminatory between customers." Additionally, the NASD Rule 2440 sets forth the Association's "5% Policy", which holds that mark-ups on securities transactions generally should not exceed 5% of the value of the stock. Therefore, Georgeson should have known that a "processing fee" amounting to nearly 12% of the gross value of a shareholder's stock and cash can hardly be considered reasonable.

47. Georgeson failed to disclose such material information to Plaintiff and other members of the Class, thereby breaching its duty.

48. The misleading statements by Defendants were all historical or then-existing statements and therefore, the statutory safe harbor provision for forward-looking statements does not apply to Defendants' representations.

49. As a direct and proximate result of the foregoing, Plaintiff and other members of the Class have suffered damages in the amount to be determined.

VIII. *PRAYER FOR RELIEF*

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, demands judgment against Defendants AT&T Corp. and Georgeson Shareholder Communications, Inc., as follows:

A. Determining that this action is a proper Class action pursuant to Federal Rule of Civil Procedure 23, certifying an appropriate Plaintiff Class, and appointing Plaintiff as Class representative and her counsel as counsel for the Class;

B. Awarding Plaintiff and other members of the Class their damages, including punitive damages, for the wrongful acts complained of in an amount to be determined at trial;

C. Directing the establishment of a Claims Resolution Facility for the determination of any individual issues that may remain after trial of Classwide issues;

D. Awarding Plaintiff and other members of the Class their costs and disbursements incurred in connection with this action, including reasonable attorneys' fees, expert witness fees and other costs; and

E. Granting such other and further relief as this Court deems just and groper.

IX. *JURY DEMAND*

Plaintiff demands a trial by jury on all issues so triable.

Dated: December 10, 2003

Respectfully submitted,

LILA T. GAVIN

By: /s/ Clinton A. Krislov
One of Her Attorneys

CLINTON A. KRISLOV
JASON STIEHL
JESSICA MCGILL
KRISLOV & ASSOCIATES, Ltd.
20 North Wacker Drive, Suite 1350
Chicago, Illinois 60606
Tel.: (312) 606-0500
Fax: (312) 606-0207
Firm ID No.: 91198

Attorneys for Plaintiff

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70a

IMPORTANT NOTICE FOR HOLDERS OF UNEXCHANGED SHARES OF U S WEST MEDIA GROUP COMMON STOCK

December 15, 2000

Dear Stockholder:

Our records show that you still hold shares of **U S WEST MEDIA GROUP**. There is no longer a market for these shares as a result of the 1998 split off from **U S WEST** and exchange into **MediaOne Group, Inc.** Each share of **U S WEST Media Group** was exchangeable into **MediaOne** on a one-for-one basis. Subsequently, in June 2000, **MediaOne** merged with **AT&T Corp.** Following the merger, you are now due 0.95 of a share of **AT&T** and a cash payment of $36.27 for every **U S WEST Media Group** share you hold, plus all accrued dividends paid on these shares. Based on AT&T's $22 price per share on December 14, 2000, each share of **U S WEST Media Group** would receive merger consideration of approximately $59. Both the number of **U S WEST Media Group** shares you own and the **AT&T** shares and cash payment due you is indicated on the attached Claim Card.

We have retained Georgeson Shareholder Communications Inc. to assist you in claiming your shares and cash. We urge you to claim those shares now. You may choose to have the AT&T shares due you sold on the open market or have them sent to you. To defray the cost of providing you with this service, a processing fee of $7 per AT&T share due you will be deducted from the additional cash payment of $36.27 per U S WEST Media Group share you are due, and paid to Georgeson Shareholder Securities Corporation, member of NASD and SIPC. **Even if you do not have your U S WEST Media Group certificate(s), you may still participate in this voluntary program.**

Please read the enclosed materials carefully. **There is no benefit in continuing to hold your old shares. Eventually, if you continue to do nothing, your stock and underlying assets will be turned over to certain state authorities under the abandoned property laws.** Georgeson Shareholder Communications Inc. is being permitted to administer this voluntary program through **January 23, 2001**. If you have questions after reading this material, please call GSC's toll-free number, at 1 (888) 352-4639 for assistance.

Sincerely,

PIN: . 7155

AT&T Corp

✂ Detach along perforation ✂

CLAIM CARD FOR HOLDERS OF UNEXCHANGED SHARES OF US WEST MEDIA GROUP

SEND TO: CONTINENTAL STOCK TRANSFER & TRUST COMPANY
C/O GEORGESON SHAREHOLDER SECURITIES CORPORATION, 110 WALL STREET, 11TH FLOOR, NEW YORK, NY 10005

I, the undersigned, agree to the terms and conditions described in the Letter and Questions and Answers from AT&T Corp., dated December 15, 2000. I hereby remove all stops previously placed on my certificate(s) and acknowledge that a processing fee of $7 per AT&T share due is to be paid to Georgeson Shareholder Securities Corporation by means of a deduction from my proceeds to defray the cost of assisting me with this special exchange effort.

FORM W-9 BELOW. By entering my social security number below and signing this card, I certify that the following Tax Identification Number is accurate and that I am not subject to backup withholding.

Enter Social Security # ___ ___

PIN: 7155 ACCT#: 015839960
MEDIA GROUP SHARES: 223.0000
AT&T SHARES: 211.0000
CASH DUE: $8088.21

CHECK ONE ☐ SELL ALL MY AT&T SHARES
☐ RECEIVE MY AT&T SHARES

JOHN T BURKE &
MARY F BURKE JT WROS
1418 10TH ST
WILMETTE IL 60091 1807

SIGN X _____ SIGNATURE OF OWNER
X _____ SIGNATURE OF CO-OWNER, IF ANY

NOTE: If a certificate(s) for your shares is not presented along with this signed Claim Card, the unpresented shares will be deemed lost and your signature will acknowledge that you agree to the terms and conditions of the Statement/Affidavit described on the back of this card.

MY DAYTIME PHONE NUMBER IS ( ) _____

01/17/01 15:46 JOHN T. BURKE & ASSOC. 002

QUESTIONS AND ANSWERS

1. Why do I have to send in my U S WEST Media Group ("Media Group") stock certificate(s)?

In 1998, Media Group was split off from U S WEST, Inc. and exchanged into MediaOne on a one-for-one basis. Subsequently, in June 2000, AT&T Corp. acquired MediaOne. As a result, your old shares are no longer traded. You now need to send in your "old" Media Group certificate(s) for the AT&T shares due you, plus cash payment and back dividends. If you do not claim your AT&T stock and cash, eventually they will be turned over to state authorities under the abandoned property laws.

2. How much will I receive if I have my AT&T shares sold?

If you choose to sell your AT&T shares, they will be sold on the New York Stock Exchange and all participating stockholders will receive the same weighted average price per share based on all shares sold from January 2, 2001 to January 23, 2001 as part of this program. Additionally, you will receive a cash payment of $36.27 per Media Group share you hold. AT&T closed at $22 per share on December 14, 2000. The $7 per AT&T share processing fee will be deducted from the additional cash payment of $36.27 per Media Group share you are due. You will be sent your cash payment approximately 4 weeks after the January 23, 2001 expiration date. We can make no recommendation as to whether or not you should sell your shares.

3. What if I don't have my Media Group certificate(s)?

Complete the Claim Card and your shares will be replaced for the purpose of exchange, as provided for in the Statement/Affidavit on the back of the Claim Card.

4. What happens if I choose to receive my AT&T shares?

If you choose to receive your AT&T shares, you will be sent your shares and cash approximately 4 weeks after the expiration date found on the front of this notification. The $7 per AT&T share processing fee will be deducted from the additional cash payment you are due.

5. How do I complete the Claim Card?

Simply mark one box indicating your choice of action and sign exactly as your name is listed on the card. If more than one name is listed, both parties must sign. If the name of the owner has changed, enclose a copy of legal documents, such as a death certificate or marriage license. Your signed Claim Card must be received in good order no later than JANUARY 23, 2001. If you have any further questions, please call 1 (888) 352-4639.

6. What are the tax consequences of the exchange and this program?

In accordance with the merger agreement, any cash consideration payable as a result of the merger is subject to tax for the year 2000. If you choose to sell your AT&T shares due you, the sale will take place after January 2, 2001 and will therefore be a 2001 taxable event. If you have questions after reading this material, call GSC's toll-free number, at 1 (888) 352-4639 for assistance.

If you need assistance, please call:

GEORGESON SHAREHOLDER
COMMUNICATIONS INC.
Toll-Free Nationwide 1 (888) 352-4639

STATEMENT/AFFIDAVIT FOR LOST STOCK CERTIFICATES OF U S WEST MEDIA GROUP

By signing the front of this Claim Card, I agree to the following: I am the lawful owner of the shares described on the front of this card. My missing certificate(s) has not been endorsed, cashed, negotiated, transferred, assigned or otherwise disposed of. I have made a diligent search for the certificate(s) and have been unable to find it (them) and I make this Statement/Affidavit for the purpose of exchanging or inducing the liquidation of the certificate(s) without surrender of the certificate(s), and the exchange or sale of the shares represented thereby, and hereby agree to surrender the certificate(s) for cancellation should I, at any time, find the certificate(s). I, hereby agree, for myself, my heirs, assigns and personal representatives, that in consideration of the exchange or the proceeds of the exchange and sale of the shares represented by the certificate(s) to completely indemnify, protect and hold harmless SAFECO Surety Company, AT&T Corp., EquiServe Trust Company, BankBoston, N.A., MediaOne Group, Inc., Georgeson Shareholder Communications Inc., Georgeson Shareholder Securities Corporation, and any other party to the transaction (the "Obligees"), from and against all losses, costs and damages, including court costs and attorneys' fees, which they may be subject to or liable for in respect of the cancellation and replacement of the certificate(s). The rights accruing to the Obligees under the preceding sentence shall not be limited by the negligence, inadvertence, accident, oversight or breach of any duty or obligation on the part of the Obligees or their respective officers, employees and agents or their failure to inquire into, contest, or litigate any claim, whenever such negligence, inadvertence, accident, oversight, breach or failure may occur or have occurred. Surety protection for the Obligees is provided under Bond# 5926165 issued by SAFECO Surety Company.

For value received the undersigned sells, assigns and transfers unto Donaldson, Lufkin & Jenrette Securities Corporation the number of shares indicated below of AT&T Corp. and hereby appoints Georgeson Shareholder Securities Corporation the attorney of the undersigned to transfer the said cash and securities on the books of the said corporation with full powers of substitution in this matter.

PLEASE SIGN THE FRONT OF THIS CARD

©2000 GEORGESON SHAREHOLDER SECURITIES CORPORATION

01/17/01 15:46 JOHN T. BURKE & ASSOC. 003

CERTIFICATE OP PROPOSED LEAD PLAINTIFF
PURSUANT TO THE FEDERAL SECURITIES LAWS

I, Lila T. Gavin, under oath, state and certify as follows:

1. I have reviewed the complaint against AT&T Corporation and Georgeson Shareholder Communications, Inc., and I authorized its filing.

2. I did not purchase the security that is the subject of this action (US. West Media Group) at the direction of plaintiff's counsel or in order to participate in any private action arising under the Securities Act of 1933, 15 U.S.C. §77a *et seq.* or the Securities Exchange Act of 1934, 15 U.S.C. §78a.

3. I am willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary.

4. My transactions in the security that is the subject of this litigation during the class period set forth in the complaint are as follows:

> I owned at all relevant times hereto a total of 235 unexchanged U.S. West Media Group shares. I exchanged my certificates of U.S. West Media Group pursuant to the offer of defendant AT&T, through its authorized agent, Georgeson, for reissued 0.95 AT&T shares per U.S. West Media Group share plus cash and was damaged thereby, including, *inter alia*, being charged a fee of $7 per AT&T share due me.

5. During the previous three years I have not served, or sought to serve, as a representative party on behalf of a class for any action brought under either the Securities Act of 1933 or the Securities and Exchange Act of 1934.

6. I will not accept any payment for serving as a representative party on behalf of a class beyond my pro rata share of any recovery, except as ordered or approved by the court as authorized by the applicable laws.

I certify and swear under penalty of perjury that to the best of my knowledge and belief, the foregoing statements are true and correct.

Dated: April 4, 2003 /s/ Lila T. Gavin
LILA T. GAVIN

APPENDIX F

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Class Action Complaint 01 CH 2

LILA T. GAVIN, on behalf of herself
and all others similarly situated,
Plaintiff,

v.

AT&T CORP., a New York Corporation, and
GEORGESON SHAREHOLDER COMMUNICATIONS, INC.,
a Delaware Corporation,
Defendants.

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff, Lila T. Gavin, individually and on behalf of the class of persons defined below, for her complaint alleges, upon knowledge as to herself and her own acts, and certain acts of others, and otherwise upon information and belief, as follows:

I. NATURE OF THE CASE

1. This case is brought on behalf of holders of unexchanged shares of U.S. West Media Group Common Stock, as set forth in detail in the class definition contained herein. As alleged herein, Defendants AT&T Corp. ("AT&T") and Georgeson Shareholder Communications, Inc. ("Georgeson"), knowingly and intentionally misrepresented or otherwise failed to disclose material facts including, inter alia, that Plaintiff

and other holders of unexchanged shares of U.S. West Media Group could exchange their U.S. West Media Group shares for AT&T shares and cash at no cost, resulting in damage to Plaintiff and other shareholders who exchanged their shares in response to Defendants' false and misleading offer to exchange them for a fee of $7.00 a share. Defendants' wrongful conduct violates the Illinois Consumer Fraud Act, 815 ILCS 505/1 *et seq.* and similar laws in the forty-nine other states and the District of Columbia.

II. JURISDICTION AND VENUE

2. *Jurisdiction.* This Court has jurisdiction over this litigation pursuant to Illinois Code of Civil Procedure, 735 ILCS 5/2-209(b)(4). Defendants AT&T and Georgeson, are corporations doing business in this State.

3. *Venue.* Venue is proper in this court under Illinois Code of Civil Procedure, 735 ILCS 5/2-101 and 5/2-202 because defendants AT&T and Georgeson, are both foreign corporations doing business in, and maintaining registered agents in Cook County, Illinois.

III. PARTIES

4. *Plaintiff.*

a. Plaintiff Lila T. Gavin is a resident of Oak Lawn, Illinois. Ms. Gavin owned at all relevant times hereto a total of 235 unexchanged U.S. West Media Group shares. Ms. Gavin exchanged her shares of U.S. West Media Group pursuant to the offer of defendant AT&T, through its authorized agent, Georgeson, for 0.95 AT&T shares per U.S. West Media Group share plus cash and was damaged thereby, including, *inter alia*, being charged a fee of $7 per AT&T share due her.

5. *Defendants.*

a. Defendant AT&T Corp. is a New York corporation with its principal place of business in New York, New York.

b. Defendant Georgeson Shareholder Communications, Inc. is a Delaware corporation with its principal place of business in New York, New York.

IV. LIMITATION ON DAMAGES

6. Plaintiff's claim is strictly for monetary damages. Plaintiff does not seek individual damages in excess of $75,000, and Plaintiff expressly disavows any claim or combination or aggregation of claims asserted in her individual capacity for damages in any amount in excess of $75,000. Plaintiff does not make a claim for any form of injunctive relief. Plaintiff makes no claim under that the acts and omissions of Defendants affected the share price of any registered security, nor does she claim any violation of the federal securities laws.

V. CLASS ALLEGATIONS

7. This action is brought and properly maintained as a class action pursuant to the provisions of the Illinois Code of Civil Procedure 735 ILCS 5/2-801 *et seq.* Plaintiff brings this action on behalf of themselves and a class of all others similarly situated, as defined herein.

8. *Class Definition.* Plaintiff requests certification of a nationwide class. If, however, the Court determines that a nationwide class is not appropriate or otherwise cannot be maintained, then, alternatively, Plaintiff requests certification of a class including all consumers who have claims arising under Illinois Law. Thus, Plaintiff requests certification of a class defined as either;

(a) *Nationwide class*: "All residents, or persons or legal entities deemed to be residents, of the fifty states and the District of Columbia, other than employees, officers and directors of AT&T Corp. and Georgeson Shareholder Communications, Inc., who exchanged their shares of U.S. West Media Group for shares of AT&T and cash, and were charged a fee by Georgeson Shareholder Communications, Inc.

(b) *Statewide class*: "All residents, or persons or legal entities, who may properly avail themselves of the Illinois Consumer Fraud Act, other than employees, officers and directors of AT&T Corp. and Georgeson Shareholder Communications, Inc., who exchanged their shares of U.S. West Media Group for shares of AT&T and cash, and were charged a fee by Georgeson Shareholder Communications, Inc.

9. *Numerosity*. Although the exact number is unknown to Plaintiff, there are thousands of members of the Class residing throughout the United States, making joinder of all class members impracticable.

10. *Common Questions of Law and Fact*. A. multitude of questions of law and fact are common to Plaintiff's claims and those of Class members. These common questions predominate over any questions affecting only individual class members and include, inter alia, the following:

(a) Whether Defendants intentionally concealed the fact that an exchange of U.S. West Media Group shares could be made at no cost;

(b) Whether Defendants misrepresented that shareholders need exchange their U.S. Media Group shares through AT&T's authorized agent, Georgeson;

(c) Whether Defendants misrepresented to U.S. West Media Group shareholders that their only choice was to exchange their U.S. West Media Group shares through Georgeson, while failure to exchange their shares through Georgeson would only result in their shares being deemed abandoned and escheating to the State;

(d) Whether Defendants' conduct violated the Illinois Consumer Fraud Act and similar laws in forty-nine other states and the District of Columbia;

(e) What is the proper amount and measure of damages awardable to Plaintiff and the Class.

11. *Typicality of Claims*. Plaintiff's claims are typical of members of the Class. Plaintiff and other Class members exchanged their shares in response to the false and misleading offer of Defendants to exchange their shares of U.S. West Media Group for a fee of $7.00 per share. Each Plaintiff is a member of the proposed class.

12. *AdequateRepresentation.* Plaintiff will adequately, vigorously and fairly represent and pursue the interests of the class members. Plaintiff understands the nature of her claims described herein. Plaintiff's claims are consistent with, and not antagonistic to, the claims of other members of the Class. Plaintiff does not have any disqualifying conditions. Plaintiff's counsel, Clinton A. Krislov and Krislov and Associates, Ltd., have vast experience in representing consumers and investors in class actions.

13. *Appropriateness of a Class Action.* Litigation of this action on a classwide basis is an appropriate method for the fair and efficient adjudication of the claims alleged herein. Class treatment is superior to other available methods for the fair and efficient adjudication of the controversy alleged herein. Allowing this action to proceed as a class action will permit a large number of similarly situated persons and entities to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would inevitably require. Class action treatment will also permit the adjudication of relatively small claims of Plaintiff and other Class members, who could not individually afford to litigate a complex claim against well-heeled corporate defendants such as those herein. Furthermore, even for those Class members who could afford to litigate such a claim, it would still be economically impracti-

cal, as the cost of litigation is almost certain to far exceed any recovery they might obtain.

14. *Manageability.* Plaintiff unaware of any difficulty likely to be encountered in the management of this case that would preclude its maintenance as a class action.

VI. SUBSTANTIVE ALLEGATIONS

15. In 1998, U.S. West Media Group was split off from U.S. West Shares of U.S. West Media Group were then exchangeable for Media One shares on a one-for-one basis.

16. Subsequently in June 2000 Media One merged with AT&T. Following the merger, Plaintiff and other U.S. West Media Group shareholders were due 0.95 of a share of AT&T and a cash payment of $36.27 for every U.S. West Media Group share they held, plus all accrued dividends paid on these shares.

17. On December 15, 2000, AT&T, through its authorized agent Georgeson, through the use of misrepresentations and/or omissions of material fact, solicited Plaintiff and other members of the Class to exchange their shares of U.S. West Media Group for shares of AT&T and cash as described above.

18. Defendants falsely represented to Plaintiff and other members of the Class that they had to send in their U.S. West Media Group shares in response to their solicitation or face losing their investment entirely. The offer to purchase stated in relevant part:

QUESTIONS AND ANSWERS

> 1. Why do I have to send in my U.S. WEST Media Group ("Media Group") stock certificate(s)?
>
> In 1998, Media Group was split off from U.S. West, Inc. and exchanged into MediaOne on a one-for-one basis. Subsequently, in June 2000, AT&T Corp. ac-

quired MediaOne. As a result, your old shares are no longer traded. You now need to send in your "old." Media Group certificate(s) for the AT&T shares due you, plus cash payment and back dividends. If you do not claim your AT&T stock and cash, eventually they will be turned over to state authorities under the abandoned property laws.

Important Notice for Holders of Unexchanged Share of U.S. West Media Group Common Stock (December 15, 2000) ("Notice").

19. Defendants represented to Plaintiff and other members of the Class that, based upon AT&T's $22 price per share on December 14, 2000, each share of U.S. West Media Group would receive merger consideration of approximately $59 per share. The number of U.S. West Media Group shares owned by Plaintiff and other members of the Class and the number of AT&T shares and cash payment due them were recorded on the uniform solicitation sent to holders of unexchanged shares of U.S. West Media Group.

20. The uniform solicitation sent to Plaintiff and other members of the Class was false and misleading insofar as it failed to disclose that the $7 per share charge was commercially unreasonable and could be avoided altogether if shareholders exchanged their shares directly through AT&T's Shareowner Services.

21. The uniform solicitation was false and misleading in that it failed to disclose the confiscatory impact of the $7 service charge which, in the case of Plaintiff, cost her hundreds of dollars in cash due her by AT&T under the terms of the merger. Instead, Defendant used scare tactics to induce Plaintiff and other members of the Class to exchange their shares immediately, intending that they rely on their false and misleading statements that an exchange must be made imme-

diately, or Plaintiff and other members of the Class faced losing their investment:

> We have retained Georgeson Shareholder Communications Inc. to assist you in claiming your shares and cash. We urge you to claim these shares now.
>
> * * *
>
> There is no benefit in continuing to hold your old shares. Eventually, if you continue to do nothing, your stock and underlying assets will be turned over to certain state authorities under the abandoned property laws.

Notice.

22. Defendants' uniform solicitation was false and misleading insofar as it failed to disclose the commercial unreasonableness of the $7 per share charged imposed by AT&T through its authorized agent, Georgeson. The charge was represented as merely incidental to the transaction and otherwise a necessary cost to shareholders who wished to "claim" their AT&T shares and cash:

> We have retained Georgeson Shareholder Communications Inc. to assist you in claiming your shares and cash. We urge you to claim these shares now. You may choose to have the AT&T shares due you sold on the open market or have them sent to you. To defray the cost of providing you with this service, a processing fee of $7 per AT&T share due you will be deducted from the additional cash payment of $36.27 per US WEST Media Group [sic] share you are due, and paid to Georgeson Shareholder Securities Corporation, member of NASD and SIPC.

Notice. Contrary to the affirmative representations of Defendants, the $7 per share "processing fee" far exceeded the cost of providing this "service," which, unbeknownst to Plaintiff

and other members of the Class was available at no cost through AT&T's Shareowner Services.

23. The confiscatory $7 per share fee withheld by Defendants was devastating to Plaintiff and other members of the class, amounting to more than 19% of the $36.27 cash payment due shareholders per U.S. West Media Group share exchanged. Despite their representation that this was merely a "processing fee" necessary to "defray the cost" of service, the $7 per share has been a tremendous source of revenue for Georgeson Shareholder Communication, aided by the threats of AT&T and Georgeson that a failure to respond would result in an greater loss: the complete loss of Plaintiff's and other Class members initial investment and capital gains.

24. Also of material importance, but which Defendants failed to disclose, is the fact that even if Plaintiff and other members of the Class "continue[d] to do nothing," and their "stock and underlying assets [were] turned over to certain state authorities under the abandoned property laws," (Notice) the cost of reclaiming those assets would be far less, and perhaps nothing.

VII. CAUSES OF ACTION

COUNT I

(Violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and Similar Laws of Other States)

25. Plaintiff repeats and realleges Paragraphs 1 through 23 *supra*, as if fully set forth herein.

26. At all relevant times hereto; there was in full force and effect an act known as the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505 *et seq.*) (the "Act") and substantially similar acts prohibited deceptive acts and practices in trade commerce in all 50 states and the District of Columbia.

27. Plaintiff and other members of the Class are "consumers" within the meaning of the Act (815 ILCS 505/2).

28. Defendants' exchange, including the offer to exchange, the U.S. West Media Group shares held by Plaintiff and other members of the Class for shares of AT&T and cash is engaging in "trade" or "commerce" within the meaning of the Act (815 ILCS 505/1(f).

29. The Act, and similar acts in the 50 states and the District of Columbia, prohibits unfair and deceptive practices in trade and commerce. The Act places the following prohibitions, *inter alia*, on Defendants:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965 in the conduct of any trade or commerce are hereby declared unlawful whether any person had in fact been misled, deceived or damaged thereby. In constituting this section consideration shall be given to the interpretations of the Federal Trade Commission and federal courts relating to Section 5(a) of the Federal. Trade Commission Act

815 ILCS 505/2.

30. In executing the offer to exchange scheme described herein, Defendants misrepresented and/or failed to disclose material facts as described herein.

31. The conduct of Defendants in connection with the offer to exchange scheme described herein constitutes an unfair or deceptive act or practice within the meaning of the

Act and similar consumer protection statutes of other states. As intended by Defendants, Plaintiff and other members of the class were induced to exchange their shares of U.S. West Media Group for shares of AT&T and cash for commercially unreasonable and unnecessary fees.

32. As a direct and proximate result the foregoing. Plaintiff and the other members of the Class have suffered damages in an amount to be determined at trial.

COUNT II

(Fraud)

33. Plaintiff repeats and realleges the allegations contained in the paragraphs 1 through 23 *supra*, as if fully set forth herein.

34. Defendants, through the uniform offer to exchange shares of U.S. West Media Group described herein, knowingly, falsely and fraudulently misstated material facts to Plaintiff and other members of the Class as described more fully herein.

35. Notwithstanding their duty to disclose such information, Defendants also knowingly, falsely and fraudulently concealed and/or intentionally omitted material facts that Plaintiff and Class members could not have discovered on their own, and which were necessary for Plaintiff and other members of the Class to make an informed decision regarding the exchange of their U.S. West Media Group shares.

36. The false and misleading statements and representations described in detail herein were both material and false in the context of inducing Plaintiff and other members of the Class to exchange their shares of U.S. West Media Group for shares of AT&T and cash for a commercially unreasonable and unnecessary fee. The omitted facts, set forth in detail herein, were necessary to make Defendants' offer to ex-

change share of U.S. West Media Group not materially false or misleading.

37. These false statements and/or omissions of material fact were known by Defendants to be false when made and were made with the intent that Plaintiff and other members of the Class would rely on them.

38. The omissions were known by Defendants to be necessary to make other representations not materially false or misleading, and were not disclosed with the intent that Plaintiff and other members of the Class would accept tender their shares for exchange.

39. As a direct result of the misrepresentations and/or omissions of material facts, Plaintiff and other members of the Class were charged commercially unreasonable and unnecessary fees under the guise that an exchange must be made without delay in order to prevent their shares from escheating to the State. In all instances, this fee exceeded 19% of the cash due Plaintiff and other members of the Class.

40. Plaintiff and other members of the Class, unaware of the falsity of Defendants' statements and representations and/or the omission or suppression of material facts, reasonably relied upon the offer to exchange their shares of U.S. West Media Group. Had Plaintiff and other members of the Class known the true facts, they would not have exchanged their shares.

41. By reason of the foregoing, Plaintiff and other members of the Class have suffered damaged in an amount to be determined at trial on this action.

COUNT III

(Fraudulent Inducement)

42. Plaintiff repeats and realleges the allegations contained in the Paragraphs through 23 *supra*, as if fully set forth herein.

43. As a direct and proximate result of the misrepresentations and/or omissions of material facts alleged herein, knowingly made by or made with reckless disregard for the truth by Defendants, Plaintiff and other members of the Class were fraudulently induced to exchange their shares of U.S. West Media Group for stares of AT&T and cash on terms that were commercially unreasonable. Defendants made the material misrepresentations described herein intending that Plaintiff and other members of the Class would rely on the statements. Defendants also omitted disclosing material facts that were necessary to make other representations not materially false or misleading.

44. As Defendants intended, Plaintiff and other members of the Class, unaware of their falsity, relied upon Defendants' material misrepresentations and/or acted without the benefit of the material facts as described herein. Plaintiff and other members of the Class did not know and in the exercise of reasonable care, could not have learned the truth prior to exchanging their shares of U.S. West Media Group for AT&T shares and cash on terms that were commercially unreasonable.

45. As a direct and proximate result of the foregoing, Plaintiff and the other members of the Class have suffered damage in an amount to be determined at hid.

COUNT IV

(Breach of Fiduciary Duty and Constructive Fraud)

46. Plaintiff repeats and realleges the allegations contained in the Paragraphs 1 through 23 *supra*, as if fully set forth herein.

47. Defendants undertook to review the investments of, and to provide advice and counsel to, Plaintiff and other U.S. West Media Group shareholders regarding what would be in the shareholder's best interests.

48. Plaintiff and other members of the Class generally had no prior training, expertise or knowledge concerning the exchange of stock pursuant to the terms of a merger and relied solely upon the advice and knowledge of Defendants.

49. By virtue of the relationship of the parties hereto, coupled with the vastly superior knowledge and bargaining position of Defendants, a confidential or fiduciary relationship arose between Plaintiff and other members of the Class on the one hand and Defendants on the other.

50. Plaintiff and other members of the Class reposed their trust and confidence in Defendants and relied on their advice and expertise.

51. Defendants knew or should have known that Plaintiff and other members of the Class placed their trust and confidence in Defendants, who accepted the confidence and trust reposed in the by Plaintiff and other members of the Class.

52. Plaintiff and other members of the Class were induced to exchange their shares of U.S. West Media Group for AT&T shares and cash on commercially unreasonable terms, when they otherwise would not have agreed to the proposed transaction had full and fair disclosure been made by Defendants.

53. Defendants have breached their fiduciary duties to Plaintiff and other members of the Class by their misrepresentations and omissions of material fact described herein in connection with the offer to exchange their shares of U.S. West Media Group.

54. As a direct and proximate result of the foregoing, Plaintiff and other members of the Class have suffered damage in an amount to be determined at trial.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff on behalf of herself and all others similarly situated, demands judgment against Defendants

AT&T Corp. and Georgeson Shareholder Communications, Inc., as follows:

A. Determining that this action is a proper Class action pursuant to 2-801 of the Illinois Rules of Civil Procedure, certifying an appropriate plaintiff Class, and appointing Plaintiff as Class representative and her counsel as counsel for the Class;

B. Awarding Plaintiff and other members of the Class their damages, including punitive damages, for the wrongful acts complained of in an amount to be determined at trial;

C. Directing the establishment of a Claims Resolution Facility for the determination of any individual issues that may remain after trial of Classwide issues;

D. Awarding Plaintiff and other members of the Class their costs and disbursements incurred in connection with this action, including reasonable, attorneys' fees, expert witness fees and other costs; and

E. Granting such other and Rather relief as this Court deems just and proper.

IX. JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: February 9, 2001 Respectfully submitted,

/s/ Lila T. Gavin
LILA T. GAVIN
One of Her Attorneys

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APPENDIX G

Section 16(b) of the Securities Litigation Uniform Standards Act of 1998, Amending the Securities Act of 1933, 15 U.S.C. § 77p, and the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(f)

15 U.S.C. § 77p

(a) Remedies additional

Except as provided in subsection (b), the rights and remedies provided by this subchapter [15 U.S.C. § 77a et seq.] shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions A covered class action is described in this subparagraph if it involves—

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that—

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) State pension plan defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(c) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action--

(A) In general

The term "covered class action" means—

(i) any single lawsuit in which—

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

15 U.S.C. § 78bb

(f) Limitations on remedies

(1) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

(3) Preservation of certain actions—

(A) Actions under State law of State of incorporation

(i) Actions preserved

Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(ii) Permissible actions A covered class action is described in this clause if it involves—

(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that—

(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(B) State actions

(i) In general

Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(ii) State pension plan defined

For purposes of this subparagraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

(C) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(D) Remand of removed actions

In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(4) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(5) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(B) Covered class action

The term "covered class action" means—

(i) any single lawsuit in which—

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves

and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(C) Exception for derivative actions

Notwithstanding subparagraph (B), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(D) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(E) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 [15 U.S.C. § 77r(b)], at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 [15 U.S.C. § 77a et seq.]

pursuant to rules issued by the Commission under section 4(2) of that Act [15 U.S.C. § 77d(2)].

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

15 U.S.C.A. § 78j

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and

judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

APPENDIX H

17 C.F.R. §240.10b5-1

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.